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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1512

TERRY BROWN, ARLENE CIRELLI, PATRICK O'HEARN, and BOB YOUNG,

Petitioners,

—v.—

NEW MEXICO *ex rel.* A. L. HAPPY APODACA, A. L. HAPPY APODACA, DAVID L. NORVELL, Attorney General of the State of New Mexico, and BETTY FIORINA, Secretary of State of the State of New Mexico,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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IN THE

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TERRY BROWN, ARLENE CIRELLI, PATRICK O'HEARN, and BOB YOUNG,

Petitioners,

—v.—

NEW MEXICO *ex rel.* A. L. HAPPY APODACA, A. L. HAPPY APODACA, DAVID L. NORVELL, Attorney General of the State of New Mexico, and BETTY FIORINA, Secretary of State of the State of New Mexico,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Petitioners respectfully pray that a writ of certiorari issue to review the orders of the Supreme Court of the State of New Mexico entered in this proceeding on April 13, 1972, which denied the petitioners leave to intervene in *New Mexico ex rel. Apodaca* v. *Fiorina*, and to review the final judgment of that court in that case entered on April 17, 1972, which upheld New Mexico's system of filing fees for candidates in primary elections.

Opinion Below

In denying intervention to petitioners, the Court below wrote no opinion. The orders denying intervention are set out in the Appendix, *infra*, pp. 13-16. The opinion of the Court below in *New Mexico ex rel. Apodaca* v. *Fiorina* is not yet reported. The opinion and the Order Making Alternative Writ of Mandamus Absolute are set forth in the Appendix to the Jurisdictional Statement filed this day in *Norvell* v. *New Mexico ex rel. Apodaca*, No. 71-——, pp. 1a-21a.

Jurisdiction

The orders of the New Mexico Supreme Court were entered on April 13, 1972, and the judgment on April 17, 1972. Petitioners filed their Notice of Appeal on April 18, 1972. The jurisdiction of this Court to review those orders and that judgment is based on 28 U.S.C. §1257(3).

Statutory Provisions Involved

New Mexico Statutes Annotated

§3-8-26 Primary Election Law—Filing fees.—The filing fee for each of the following offices is:

> A. All officers receiving salary—6% of the first year's salary. . . .

Questions Presented

(1) Whether the Supreme Court of New Mexico deprived petitioners of their liberty without due process of law in denying their applications to intervene in this action.

(2) Whether petitioners, potential voters and candidates for nomination in the New Mexico primary, have standing to invoke the jurisdiction of this Court to review the judgment below which upheld the state requirement of filing fees.

(3) Whether the filing fees for primary candidates required by §3-8-26(A) New Mexico Statutes Annotated are constitutional.

Statement of the Case

The statement of the case is set out in the Jurisdictional Statement filed this day in *Norvell* v. *New Mexico ex rel. Apodaca*, pp. 3-9, No. 71- ——.

At this point petitioners would simply add that they are both candidates for nomination by primary, who have been barred from the ballot for failure to pay New Mexico's substantial filing fees, and their supporters who are voters in New Mexico. They were all denied the right to intervene in the proceedings below which found those fees constitutional. They contend that the denial of intervention deprived them of their liberty without due process of law, that they have standing to challenge the filing fee requirements in this Court, and that those requirements are unconstitutional.

How the Federal Questions Were Raised

The first question, whether the Constitution required the Court below to allow petitioners to intervene, was raised in petitioners' motions to intervene. Each motion specified that petitioners would be deprived of their liberty without due process of law if the Court denied the motion.

The second question, whether petitioners have standing to seek review of the final judgment of the Court below in *New Mexico ex rel. Apodaca* v. *Fiorina*, concerning the constitutionality of New Mexico's filing fees, is one concerning the jurisdiction of this Court and need not—and could not—have been raised below.

The third question, whether New Mexico's system of filing fees in primary elections is constitutional, was raised in the response of the Secretary of State and the Attorney General to the writ of mandamus in the Court below.

Reasons for Granting the Writ

The following significant questions are presented in this petition for writ of certiorari. To deal with these issues the Court should take jurisdiction and review the decision of the Court below.

I.

The Court should determine whether petitioners were deprived of due process of law by being excluded from the proceeding below.

It is a basic principle of Anglo-American jurisprudence that "no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court." *Mallow* v. *Hinde*, 25 U.S. (12 Wheat.) 194, 198.

Although few courts have clearly passed on the point—presumably because the principle is so deeply imbedded in our jurisprudence that it is rarely violated—commentators and courts recognize that a failure to protect those not before the Court may rise to the level of a deprivation of due process "should the judgment in the action have the effect of destroying their rights." 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §1602 at p. 20; *Britton* v. *Green*, 325 F.2d 377, 382 (10th Cir. 1963); *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F.2d 216, 224 (5th Cir.), *cert. denied* 329 U.S. 782 (1946); *Osborne* v. *Campbell*, 37 F.R.D. 339, 342 (D.W.Va. 1965); *cf.* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 368 (1967); MOORE'S FEDERAL PRACTICE ¶19.01-1[2]. Thus *Shields* v. *Barrow*, 58 U.S. (17 How.) 130 (1855), the case out of which the modern notion of an indispensable party, now codified in Rule 19 of the Federal Rules of Civil Procedure, arose, spoke in a manner that seemed grounded in fundamental notions of due process. There, in affirming the decision of the trial court to dismiss an action to set aside a compromise of an action

because all parties to the compromise were not before the court, the Supreme Court said that a trial court

> can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights.

In more recent times the existence of codified rules of procedure in both federal and state courts which provide for the joinder or intervention of affected third parties have rendered the constitutional right to intervention a relatively unlitigated matter. See C. WRIGHT & A. MILLER, *supra*, §1602. Yet recently this Court had occasion to note that the issue remained an open one and that the Court was aware of its existence. In ruling that a person whose interests "may be affected" is not an indispensable party within the meaning of Rule 19 of the Federal Rules of Civil Procedure, the Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 123 (1968) stated

> [n]either Rule 19, nor we today, mean to foreclose an examination in future cases to see whether an injustice is being, or might be, done to the substantive, or, for that matter, constitutional, rights of an outsider by proceeding with a particular case.

In at least two cases the Court has implicitly ruled that there is a constitutional dimension to the joinder of parties. In *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961), Pennsylvania had proceeded in state court against Western Union to claim certain long-unpaid money orders and drafts under its escheat powers; Western Union

showed that the obligations in question had been in part escheated to New York. The Court reasoned that since the widespread activities of Western Union and proliferating state escheat laws could subject Western Union to suit in virtually every state in the Union, no single state could escheat the funds to itself without providing a forum where all claimants could be heard. Since Pennsylvania could not provide such a forum, it ought to have dismissed the action. Similarly the Court reasoned in *Hanson* v. *Denckla*, 357 U.S. 235 (1958), that a state could not take jurisdiction over the body of a trust where neither the trustee nor any beneficiaries with an interest adverse to the complainants were before the court. The court noted in passing that the clearest violations of due process were in those cases where

> the court failed to employ a means of notice reasonably calculated to inform nonresident defendants of the pending proceedings, or denied them an opportunity to be heard in defense of their interests. 357 U.S. at 245. [Footnotes omitted]

In this case, the court not only failed to give any notice to the affected parties—contrary to its own rules—but also refused, without explanation, to permit them to join in the action.

The reason why each affected party should, where feasible, have his day in court is simple: only the party affected can clearly perceive his own interest, and thus only he can adequately protect it in a trial. It is particularly important in cases involving an extraordinary writ against public officials that those directly affected be notified of the action and permitted to intervene. Public officials may well be simply stakeholders of the public weal with no real in-

terest in the outcome of the lawsuit, and they may thus be particularly ill-suited to proceed in an adversary fashion. See *Smith* v. *Indiana*, 191 U.S. 138, 148 (1903); *Tyler* v. *Judges of the Court of Registration*, 179 U.S. 405 (1900). Because of this lack of true adversaries, there is a greater possibility for collusive and fraudulent lawsuits in this type of litigation than in any other type. Of course there is some argument for only permitting public officials to litigate cases involving public issues because the number of involved persons may be too great to join or to give notice to. Such, however, was not the case here. The class directly affected by this lawsuit was those persons who had filed without fee. The number was not large and the court was aware of who those persons were.[1]

Often in issues of public importance the failure to join directly affected parties is ameliorated by the fact that they can litigate a lawsuit of their own to protect their interests. But that is not the case here. The New Mexico judgment is, if not immediately reversed, a final decision on the merits; there is no time prior to the June 6 primary to relitigate the issue. The New Mexico Court must have been aware that, as a practical matter, its judgment was the last available prior to the election—save the possibility of review by this Court.

That makes particularly important the fact that the normal litigant's right of appeal might be totally lost by the action of the New Mexico Court. Had petitioners been allowed to intervene, it is clear that they would have had a right to appeal to this Court. See *United States* v. *Allegheny County, Pa.*, 322 U.S. 174, 191-92 (1944); 28 U.S.C.

[1] The court had before it, in evidence, a list of all who had filed for each political office in the primary; the list indicated which ones had and had not paid the filing fee.

§1257(2). And their interest in the matter made it likely that they would pursue such an appeal with vigor and dispatch. Not so, however, with the nominal parties Fiorina and Norvell. Their personal interest was not so directly affected that they would, despite local political pressure, take an immediate appeal to this Court. Mrs. Fiorina, perhaps predictably, has stated that she has no desire to appeal the judgment below even though it is she who is most directly affected by the writ of mandamus and even though she is presently in violation of that order by permitting all Senatorial candidates to file, irrespective of payment of the filing fee.[2] See *Northern Indiana R. Co.* v. *Michigan Central R. Co.*, 56 U.S. (15 How.) 233 (indispensability where there was a possibility of conflicting injunctions).

The action of the New Mexico State Court in refusing to permit intervention had the effect of insuring that only the parties least likely to appeal would be before the Court.

II.

The Court should determine whether petitioners have standing to invoke this Court's jurisdiction to review the New Mexico Supreme Court's decision on the constitutionality of New Mexico's statutory filing fees.

It has been said that the power of judicial review in the Supreme Court most essential to federalism is that exercised over the decisions of state legislatures. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). If that is true, then this Court has special need to accord standing

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[2] Although Mrs. Fiorina's action in allowing all Senatorial candidates to file without fee eliminated appellant Norvell's personal interest in the litigation, he is nonetheless bringing an appeal, filed today, *Norvell* v. *New Mexico ex rel. Apodaca*, No. 71- ——.

to petitioners to challenge the final judgment of the Court below regarding the constitutionality of New Mexico's filing fees. Here the Court faces a case where the state court in question has done its utmost to insulate from review its final decision upholding the validity, under the federal constitution, of the filing fee required in its election law.[3] It has gone to final judgment against nominal parties, public officials, while without reason excluding from the proceeding the very persons whose rights were being litigated. It is essential that either petitioners here or the Attorney General in his appeal have standing to challenge the merits of that suit before this Court, otherwise litigants will be free to bring suits such as these in order to obtain unreviewable judgments upholding suspect state statutes, insulated from this Court's scrutiny.

As we have argued in Point I above, petitioners were denied due process of law when the court below refused to allow them to intervene in the action then about to commence. That being the case, petitioners ought to be able to raise the merits of the controversy here.[4] They are all

[3] The intent of the New Mexico Supreme Court is most clearly shown in exempting from its final order the three plaintiffs in the *Dillon* suit. Had they not been exempted, then, on that basis they could have sought review of the decision either by appeal from the decision of the three-judge court or by an extraordinary writ from this Court under 28 U.S.C. §1651. See *United States* v. *Haley*, 371 U.S. 18 (1962).

[4] While under normal circumstances the preferable procedure might have been to seek review of the intervention issue and, then in the event of a favorable decision in this Court, return to the state court as intervenors. The expedited schedule of this case in the Supreme Court of New Mexico did not permit such a procedure. The normal return time on a writ of mandamus in that court is ten days. Rule 24(3), Rules of the Supreme Court of New Mexico; 21-2-1(29) N.M.S.A. In this case the court below reduced that time to five days. Petitioners were able to seek intervention only moments before the hearing began; it would not have been possible for this

parties directly affected by the ruling below; Petitioners Brown and O'Hearn will not be able to run for party nominations; petitioners Young and Cinelli will not be able to vote for them.[5] The personal interest that these parties have is much greater than that of either the Secretary of State or the Attorney General.[6] Moreover, if the court decides that adjudication of the action below without permitting petitioners to intervene deprived petitioners of liberty without due process of law, it would be somewhat anomalous then to decide that petitioners cannot appeal the merits because they were not parties below.

III.

The Court should determine whether New Mexico's statutory filing fee arrangement is unconstitutional under the doctrine of *Bullock* v. *Carter*.

For the arguments under this section, the Court is respectfully referred to Point II in the Jurisdictional Statement filed this day in *Norvell* v. *New Mexico ex rel. Apodaca*, pp. 12-26.

Court to act fast enough for the petitioners to join in the hearing as intervening parties.

[5] In analogous federal cases, the courts have had no problem in deciding that both voters and candidates had standing to object to unconstitutional filing fees. *Jenness* v. *Little*, 306 F. Supp. 925, 927 (N.D. Ga. 1969), *appeal dismissed as moot*, 397 U.S. 94 (1970); *Georgia Socialist Workers Party* v. *Fortson*, 315 F. Supp. 1035 (N.D. Ga. 1970), *aff'd on other grounds sub nom. Jenness* v. *Fortson*, 403 U.S. 431 (1971); *Carter* v. *Dies*, 321 F. Supp. 1358 (N.D. Tex. 1970), *aff'd sub nom. Bullock* v. *Carter*, 40 U.S.L.W. 4211 (U.S. Sup. Ct. Feb. 24, 1972).

[6] It may even be that neither of them could even bring an appeal in this court, see *Smith* v. *Indiana*, 191 U.S. 138, 148 (1903); *Tyler* v. *Judges of Court of Registration*, 179 U.S. 405 (1900). *But see* Point I in the Jurisdictional Statement in *Norvell* v. *New Mexico ex rel. Apodaca*, No. 71- ——, filed this day pp. 10-12.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

May , 1972

APPENDIX

Orders of the Supreme Court of the State of New Mexico Denying Intervention

IN THE

SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, April 13, 1972

No. 9454

STATE OF NEW MEXICO, *ex rel.* A. L. HAPPY APODACA and A. L. HAPPY APODACA,

Relator,

vs.

BETTY FIORINA, Secretary of State of the State of New Mexico, and DAVID L. NORVELL, Attorney General of the State of New Mexico,

Respondents.

ORIGINAL MANDAMUS PROCEEDING

This matter coming on for consideration by the Court upon motion of Terry Brown to intervene in the above entitled cause, and the Court having considered said motion and being sufficiently advised in the premises;

IT IS ORDERED that motion of Terry Brown to intervene in the above entitled cause be and the same is hereby denied.

ATTEST: A True Copy

ROSE MARIE ALDERITE
Clerk of the Supreme Court
of the State of New Mexico

IN THE

SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, April 13, 1972

No. 9454

STATE OF NEW MEXICO, *ex rel.* A. L. HAPPY APODACA and A. L. HAPPY APODACA,

Relator,

vs.

BETTY FIORINA, Secretary of State of the State of New Mexico, and DAVID L. NORVELL, Attorney General of the State of New Mexico,

Respondents.

ORIGINAL MANDAMUS PROCEEDING

This matter coming on for consideration by the Court upon motion of Arlene Cinelli to intervene in the above entitled cause, and the Court having considered said motion and being sufficiently advised in the premises;

IT IS ORDERED that motion of Arlene Cinelli to intervene in the above entitled cause be and the same is hereby denied.

ATTEST: A True Copy

ROSE MARIE ALDERITE
Clerk of the Supreme Court
of the State of New Mexico

IN THE

SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, April 13, 1972

No. 9454

STATE OF NEW MEXICO, *ex rel.* A. L. HAPPY APODACA and A. L. HAPPY APODACA,

Relator,

vs.

BETTY FIORINA, Secretary of State of the State of New Mexico, and DAVID L. NORVELL, Attorney General of the State of New Mexico,

Respondents.

ORIGINAL MANDAMUS PROCEEDING

This matter coming on for consideration by the Court upon motion of Patrick O'Hearn to intervene in the above entitled cause, and the Court having considered said motion and being sufficiently advised in the premises;

IT IS ORDERED that motion of Patrick O'Hearn to intervent in the above entitled cause be and the same is hereby denied.

ATTEST: A True Copy

ROSE MARIE ALDERITE
Clerk of the Supreme Court
of the State of New Mexico

IN THE

SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, April 13, 1972

No. 9454

STATE OF NEW MEXICO, *ex rel.* A. L. HAPPY APODACA and A. L. HAPPY APODACA,

Relator,

vs.

BETTY FIORINA, Secretary of State of the State of New Mexico, and DAVID L. NORVELL, Attorney General of the State of New Mexico,

Respondents.

ORIGINAL MANDAMUS PROCEEDING

This matter coming on for consideration by the Court upon motion of Robert R. Young to intervene in the above entitled cause, and the Court having considered said motion and being sufficiently advised in the premises;

IT IS ORDERED that motion of Robert R. Young to intervene in the above entitled cause be and the same is hereby denied.

ATTEST: A True Copy

ROSE MARIE ALDERITE
Clerk of the Supreme Court
of the State of New Mexico

Petitioners' Notice of Appeal

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO

No. 9454

STATE OF NEW MEXICO, *ex rel.* A. L. HAPPY APODACA, and A. L. HAPPY APODACA,

Relators,

—vs.—

BETTY FIORINA, Secretary of State of the State of New Mexico, and DAVID L. NORVELL, Attorney General of the State of New Mexico,

Respondents.

Notice is hereby given that Terry Brown, Patrick O'Hearn, Arlene Cinelli, and Bob Young, Petitioners to intervene as of right, hereby appeal to the Supreme Court of the United States from (I) the final order and judgment of the Supreme Court of the State of New Mexico denying Petitioners' application and motion to intervene as of right (§21-1-1(24)(a), N. M. Stat. Ann. 1953 (Repl. 1970)) entered in the above-styled and abo e-numbered cause as against Petitioners to intervene as of right named in this Notice on April 18, 1972, and (II) from the final order and judgment of the Supreme Court of the State of New Mexico as against David Norvell and Betty Fiorina, Respondents, requiring Respondent Betty Fiorina to omit the names of third-party intervenors Terry Brown and Patrick

O'Hearn from the official primary election ballot of the State of New Mexico at 5:00 p.m., April 21, 1972, unless Petitioners to intervene as of right Terry Brown and Patrick O'Hearn comply with the provisions of §3-8-26(A), N. M. Stat. Ann. 1953 (Repl. 1970), requiring Petitioners to Intervene as of Right Brown and O'Hearn to pay certain filing fees for elective office, by that time and date entered in the above-styled and above-numbered cause as against Respondents named in this Notice on April 17, 1972. This Appeal is taken pursuant to 28 U.S.C., §1257(2).

Dated this 18th day of April, 1972.

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In the Supreme Court of the United States

..... TERM, 197.....

No. A-1096

TERRY BROWN, ARLENE CIRELLI, PATRICK O'HEARN, and BOB YOUNG,
Petitioners,

vs.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENTS IN OPPOSITION

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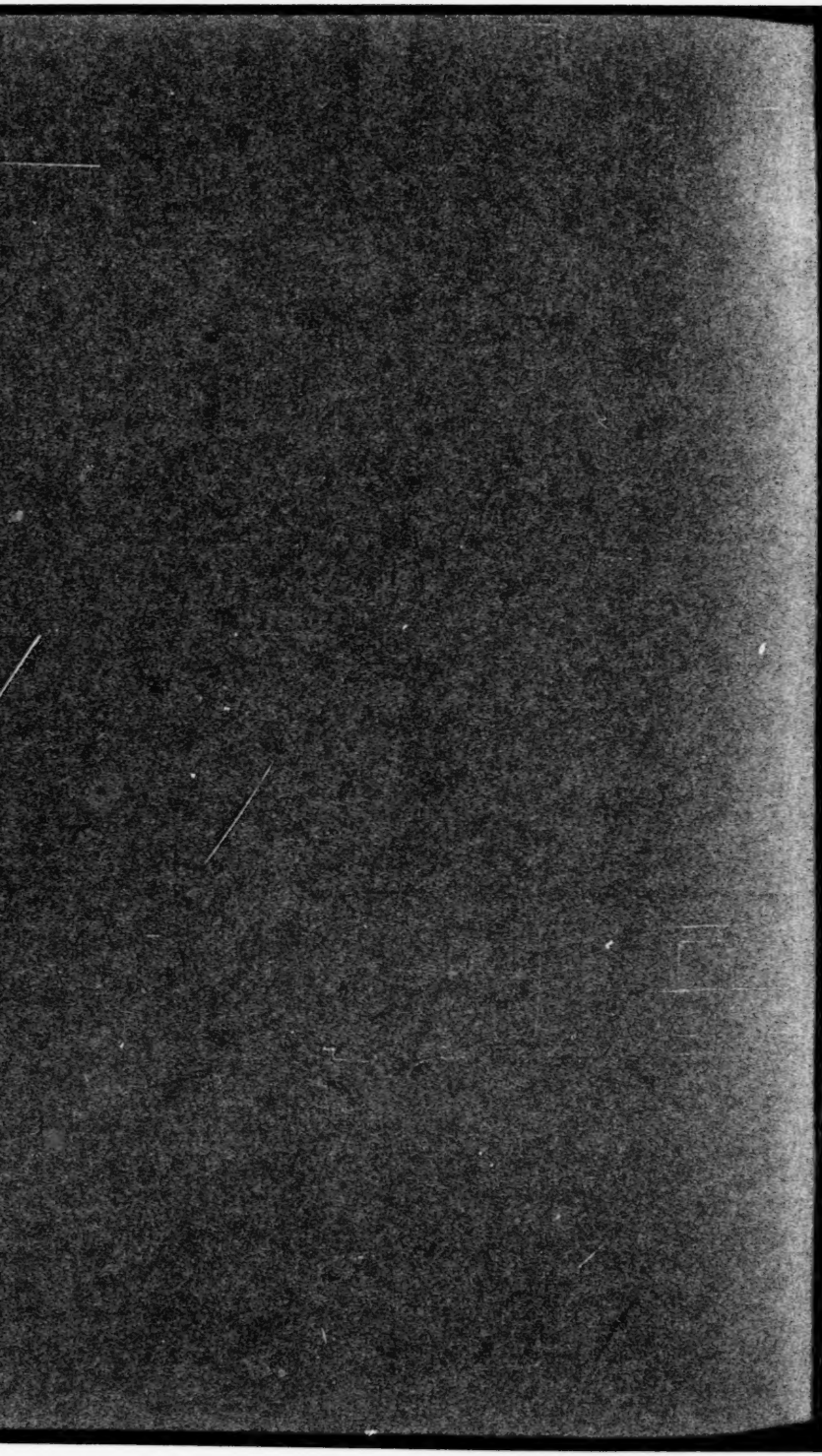

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In the Supreme Court of the United States

..... TERM, 197.....

No. A-1096

TERRY BROWN, ARLENE CIRELLI, PATRICK O'HEARN, and BOB YOUNG,
Petitioners,

vs.

NEW MEXICO *ex rel.* A. L. HAPPY APODACA, A. L. HAPPY APODACA, DAVID L. NORVELL, Attorney General of the State of New Mexico, and BETTY FIORINA, Secretary of State of the State of New Mexico,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

In denying intervention to petitioners the Court below wrote no opinion. The orders denying intervention are set out in the Appendix, pp. 13-16, of the Petition. The opinion of the court below of New Mexico in *New Mexico ex rel. Apodaca* v. *Fiorina*, Vol. II, No. 2, N.M. State Bar Bull., pp. 14-18, is set out in the Appendix, infra, pp. A15-A32. The opinion and the Order Making Alternative Writ of Mandamus Absolute are set forth in the Appendix to the Jurisdictional Statement filed in *Norvell* v. *New Mexico, ex rel. Apodaca*, No. 71-....., pp. 1-A through 21-A.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(1) Petitioners' interest was "adequately represented" by existing parties to the lawsuit.

(2) To allow petitioners' intervention would have the effect of creating havoc in the orderly process of bureaucratic government.

STATUTORY PROVISION INVOLVED

A. The Statute

New Mexico Statutes Annotated

§3-8-26 Primary Election Law—Filing fees.—The filing fee for each of the following offices is:

A. All officers receiving salary—6% of the first year's salary. . . .

STATEMENT OF THE CASE

With the noted exceptions, respondents accept the statement of the case as set out in Appellant's Jurisdictional Statement, pp. 3-9. Appellant in the Jurisdictional Statement by footnote concedes that the transcript of the proceedings below is not yet available and will not be available until May 8, 1972, at the earliest (Jurisdictional Statement 5). For that reason, appellant indicates that any references to testimony in the Jurisdictional Statement are based on the recollection and notes of those who were present at the hearing and respondents are in disagreement with the "recollection" of those at the hearing whom appellant relied upon. Therefore, because this is not a brief on the merits, respondents object to any references in appellant's brief

to testimony not available by transcript. It is irrelevant to the decision on granting certiorari.

I. Petitioners' Interest Was "Adequately Represented" by Existing Parties.

Petitioners contend that the action of the New Mexico Supreme Court in denying the motions for intervention was improper. They argue that such denial precluded any direct appeal to this Court on the merits, constituting a denial of due process. Yet, not once in the Petition do petitioners even allude to Rule 24, New Mexico Rules of Civil Procedure, nor is more than fleeting reference made to the principles surrounding the right of intervention. As to the argument which is presented by petitioners, respondents fail to perceive its relevancy to the determination of whether the action of the New Mexico court was proper. We would argue that controlling and determinative here are the principles applicable to Rule 24 which petitioners have so conveniently ignored.

The right to intervene is of two types: absolute, and discretionary or permissive. Rule 24(a) and (b), New Mexico Rules of Civil Procedure. At this juncture it should be noted that considerable reference will be made to the Federal Rules of Civil Procedure, particularly Rule 24, but respondents feel that the discussions will be applicable to the case at bar for New Mexico's Rule 24 has followed, completely, the changes in the Federal Rule.

Rule 24(a)(2), Federal Rules of Civil Procedure, dealing with the non-statutory absolute right to intervene, applicable in the case at bar, was amended in 1966. Under that former rule, an absolute right existed when the applicant claimed an interest in property in the hands of the court, or when the applicant was inadequately represented in an action in which the decision would be binding upon

applicant. By the 1966 Amendment, clauses (3) and (2), respectively, were merged into the present Rule 24(a)(2), making it consistent with the 1966 revision of Rules 19 and 23. The result of the 1966 Amendment was that now under Rule 24(a)(2), the absolute right exists only when the applicant claims an interest in the subject of the action, when the interest may be adversely affected by disposition of the action, and when the interest is not adequately represented. Although speaking of the Federal Rules, Judge Wright's comments in *Hobson* v. *Hansen*, 44 F.R.D. 18, 5 A.L.R. Fed. 497 (D.C.Colo. 1968), are applicable in the instant case. Judge Wright observes:

> While one's interest need no longer be decisively affected before intervention will be allowed, there is nothing in the new rule or in its attendant commentary to indicate that it effected a change in the kind of interest required. Thus the thrust of the revision seems clearly to be concerned with the adequacy of representation and not with any notion of expanding the types of interests that will satisfy the rule. Still required for intervention is a direct, substantial, legally protectable interest in the proceedings.

A careful reading of Rule 24(a)(2) quickly reveals that the grounds, discussed above, are subject to the condition that the applicant's interest be not adequately represented by existing parties. The 1966 Amendment, through the consolidation of clauses (2) and (3), rephrased the old standard so that the present Rule 24(a)(2) permits intervention "unless the applicant's interest is adequately represented by existing parties."[1] Because petitioners lack the

1. Noted by Justice Stewart in his dissent in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, (1967) 386 U.S. 129, 155, 87 S.Ct. 932, 17 L.Ed.2d 814, the "requirement of inadequate representation by existing parties as a precondition of the right to intervene under the new Rule 24 is obviously an adoption of the similar standard contained in the former 24(a)(2)."

statutory right to intervene in order to sustain their objection to the allegedly wrongful denial of intervention, it is necessary that they show, in addition to an interest which is threatened, inadequate representation by existing parties to the action. Such requirement is not without authority.

Petitioners have failed miserably in establishing any basis for assertions of inadequate representation, making only the fleeting suggestion that because the existing parties to this lawsuit were "public officials" they were "simply stakeholders of the public wealth with no real interest in the outcome of the lawsuit" and not "true adversaries." (Petition 8) The weakness of petitioners' convictions on this issue is clearly displayed when they state that, "Because of the lack of true adversaries, there is a **greater possibility** for collusive and fraudulent lawsuits in this type of litigation than in any other type." (Petition 8) But "greater possibility" in itself is not sufficient, for although many courts have traditionally taken a liberal approach to Rule 24(a), "Liberality, . . ., does not equate with the rights of indiscriminate intervention." *Peterson* v. *U. S.*, 41 F.R.D. 131 (D.C.Minn. 1966); *Standin* v. *Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962). It has been well established by this Court in *U. S.* v. *Blue Chip Stamp Company*, 272 F. Supp. 432 (D.C.C.D. Calif. 1967), aff'd *Thrifty Shoppers Scrip Co.* v. *U. S.*, 389 U.S. 580, that:

> If the petitioners are appearing merely as members of the public, in the public interest, then it is incumbent upon them **to establish that the government has not acted properly in the public interest** (Emphasis supplied)
>
> 272 F.Supp. at 438.

It has been further held in *Peterson* v. *U. S.*, supra, that:

> The controlling rule is that representation is adequate if there is no collusion between the representatives and an opposing party, if the representative does not have or represent an interest adverse to the applicant, and if the representative does not fail in the fulfillment of his duty.
>
> 41 F.R.D. at 134.

See also *Standin* v. *Union Electric Co.*, supra.

This Court, in the earlier case of *State of New Jersey* v. *State of New York*, 345 U.S. 369 (1953), considered at some length the policy behind such a judicial position. That action, addressed to the original jurisdiction of this Court, was initiated by the State of New Jersey seeking injunctive relief against the State and City of New York to prevent the proposed diversion of the Delaware River. The State of Pennsylvania moved for leave to intervene, which was allowed. The City of Philadelphia then made a motion for intervention, as well—which was denied by the Court in this opinion. The Court directed particular attention to one of the arguments in opposition to the intervention "that the Commonwealth of Pennsylvania has the exclusive right to represent the interest of Philadelphia as parens patriae." The Court observed:

> The "parens patriae" doctrine however, has aspects which go beyond mere restatement of the Eleventh Amendment; it is a recognition of the principle that the state when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." *Kentucky* v. *Indiana*, 281 U.S. 163, 173, 174 (1930). This principle is a necessary recognition of sovereign dignity, as well as a working rule for good

> judicial administration. Otherwise a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.
>
> 345 U.S. at 372, 373.

The Court discusses "the wisdom of the rule," pointing out that the City of Philadelphia represents only a part of the citizens of the state who reside in the watershed area affected by the proposed diversion. Realizing this fact and the possible ramifications thereof, the Court states that if all the separate interests were allowed to intervene the Court could, ". . . be drawn into an intramural dispute over the distribution of water within the Commonwealth." The Court further expresses the fear that the list of intervenors could never be closed with intervention by political subdivisions of the states, for there were the large industrial plants which, like cities, were corporate creatures of the state having interests just as substantial.

Petitioners' attempt to discount the Court's fears expressed in *New Jersey* v. *New York*, saying that here only the class who did not file the fee was involved, a group they describe as small in number (Petition 8). This is patently incorrect, for in the case at bar, not only did the class of candidates not filing fees number 92, but two of the petitioners also were supporters vis-a-vis voters of the State of New Mexico, and to allow them to intervene would open the door to all 431,608 of New Mexico's registered voters[2] to do likewise. The Court, in *New Jersey* v. *New York*, concerned about the expansion of its original jurisdiction (as was the New Mexico Supreme Court which

2. According to statistics compiled by the Secretary of State of New Mexico.

was likewise exercising original jurisdiction), set the following guidelines:

> Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures, which interest is not properly represented by the state.
>
> 345 U.S. at 373.

A very brief and concise summation of the Court's action in this case is offered by Justice Jackson, writing for the dissent,[3] where he says:

> The city, of course, is not an indispensable party, and it is generally bad policy to encumber any case with unnecessary intervenors.
>
> 345 U.S. at 375.

Some question has been raised as to whether the 1966 Amendment's change in language from "when" the representation may be inadequate to "unless" the interest is adequately represented, and the relocation of such clause has had the effect of placing on the person opposing the intervention the burden of showing adequacy of representation. At least one leading authority, 3B Moore's Federal Practice, §24.09-1(4), has commented on this:

> In the absence of a stronger showing of rule-making intent, and according to traditional considerations of policy and convenience, the burden to show that repre-

3. Although Justice Jackson was writing for the dissent, it appears that he was swayed by the fact that New York City had been allowed to intervene earlier in the case and for that reason he argued for intervention.

> sentation may be inadequate ought to be upon the applicant. At the same time, it can be argued that the applicant should be the best judge of the adequacy of his own interests.

Accord, *Edmondson* v. *State of Nebraska*, 383 F.2d 123 (8th Cir. 1967). At the risk of being repetitious, respondents will note once again that petitioners have failed to carry this burden, almost to the degree of ignoring it. In fact, when the transcript of the hearings is available it will reflect that counsel for petitioners, when seeking intervention, admitted in open court that he had been retained by William S. Dixon, Special Assistant Attorney General, to represent petitioners in that matter. So it hardly seems proper that petitioners should now complain that the Attorney General failed to provide adequate representation.

Petitioners argue that the normal litigant's right of appeal might be lost by the action of the New Mexico court. By itself, such contention is without merit. Particularly appropriate here are Judge Zavatt's comments in *Blocker* v. *Board of Education of Manhasset, New York*, 229 F. Supp. 714, 715 (E.D.N.Y. 1964), quoted in *Hobson* v. *Hansen*, supra:

> Now that the Board has recognized this fact and decided not to appeal, some electors of the community have asked this court to appraise the soundness and propriety of that decision by finding that the petitioners may not be represented adequately by the Board. The issue is simply one of disagreement between the proposed intervenors and the Board; no allegation is made that the Board has been negligent or guilty of bad faith in reaching its determination. The Supreme Court, in a closely analogous situation has warned us of the danger inherent in such a judicial appraisal: * * *

> *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 698, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961). As one commentator has put it, "[r]epresentation by the governmental authorities is considered adequate in the absence of gross negligence or bad faith on their part." 4 Moore, Federal Practice ¶24.08 at 43 (2d ed. 1963). The court need not, however, pass upon the adequacy of the representation afforded the proposed intervenors by the defendant School Board.

Also quoted by the Court in *Hobson* is *Alleghany Corporation* v. *Kirby*, 344 F.2d 571 (2nd Cir. 1965), cert. dismissed as improvidently granted, 384 U.S. 28 (1966), where Judge Kaufman said:

> We fully agree with the District Court's conclusion that, on the record before it, the decision of the independent members of the Board of Directors not to apply for certiorari, after consultation with independent counsel and full presentation and consideration of relevant business and legal implications, did not result in "inadequate representation as a matter of law." We know of no proposition of law that permits shareholders, absent any allegations of bad faith, collusion or negligence, concededly neither present nor charged here, cf. Sam Fox Publishing Co. * * *, to intervene, as of right, in order to continue litigation that independent members of the Board of Directors, acting in good faith and in the exercise of sound business judgment, have decided to terminate. * * *
>
> Adequacy of representation, at least in the context of this case, depends not on our assessment of whether the Board should have authorized a certiorari petition, but rather on whether shareholder interests were fully and fairly considered when the Board reached its decision. Stated somewhat differently, the mere fact that

> a particular decision is adverse to certain interests does not necessarily mean those interests were not adequately represented in the decision-making process or in the decision itself.
>
> 344 F.2d at 573, 574.

See also *Spangler* v. *Pasadena City Board of Education*, 427 F.2d 1352 (9th Cir. 1970), in which the court affirmed the denial of intervention after concluding that the board of education had defended the action to compel integration in a full trial on the merits and that the decision not to appeal was made by a board of "elected representatives of the residents of the school district." Here again the determining factor is that of the adequacy of the representation, which will have to be assumed to be sufficient and adequate in the absence of any proof to the contrary.

Petitioners have made an emotional appeal, but examining the real issues reveals that the action of the New Mexico Court denying intervention was reasonable and based upon sound public policy. From the foregoing authority it is apparent that the mere fact that some citizens disagree will not justify allowing them to intervene in a lawsuit where there are elected representatives already representing the public interest. To allow intervention without a sufficient showing of bad faith or gross negligence would undermine the whole system of state government.

II. To Allow Petitioners' Intervention Would Have the Effect of Creating Havoc in the Orderly Process of Bureaucratic Government.

Aside from the legal arguments presented in Point I, the practical and philosophical aspects of the issue sought to be reviewed by this Court are so monumental that they, too, must be afforded consideration.

Though petitioners imply that the proposition permitting only public officials to litigate cases involving public issues is subject to limited approval, the proposition is vital to the very nature of representative government. The existence of the American Republic depends on the fundamental proposition that the elected representatives of government, within Constitutional guidelines, should be allowed to govern. Government "by the people, for the people and of the people" must be allowed to exert the responsibility with which it has been entrusted.

Essential to a system of elected officials is that these officials represent the interests of the people.

> The powers so delegated to the officer are held in trust for the people and are to be exercised in behalf of . . . all citizens. . . .
>
> 42 Am.Jur. §8, 885.

However, the system would fail if, on every question, individual citizens were allowed to formally intervene. To permit such intervention would destroy the need for elected officials and quickly lead to an anarchistic situation.

The case before the court exemplifies not only the necessity of governmental representation, but also, the autonomy so vital to that representation. Though petitioners only allude to the number of potential intervenors in the case, respondents believe that

> Appellate briefs must openly, candidly and **fully** acquaint the Supreme Court with the . . . consequences of the possible ruling. II C. Antineau, Modern Constitutional Law, 745, 15.49 (1969) (Emphasis supplied)

The consequences of a ruling by this Court in favor of petitioners' right of intervention would impliedly enable

431,608[4] registered voters of New Mexico to intervene. Further, the total number of candidates who had filed without fee and would, by petitioners' own admission, be directly affected by this lawsuit, amounts to 92.[5] Though 92 candidates and 431,608 voters as potential intervenors may not appear to petitioners to be a significant number, the absurdity of allowing that number of interventions in a suit where the opposing sides are more than adequately represented is obvious. Any attempt by the state, through its officials, to represent and protect the public interest on any issue would be disastrously crippled by allowing this intervention.

The importance of **this** protection and representation was recognized by Alexander Hamilton in the Federalist Papers No. 28,

> It may safely be received as an axiom in our political system that the state governments will, in all possible contingencies, afford complete security against invasions of the public liberty. . . .

To allow this intervention would not only jeopardize the vitality and autonomy of state governments, but also, would impliedly deny the responsibility and function of all bureaucratic government.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

IRVING E. MOORE
Attorney for Respondents
6001 Marble Avenue, N.E.
Albuquerque, New Mexico 87110

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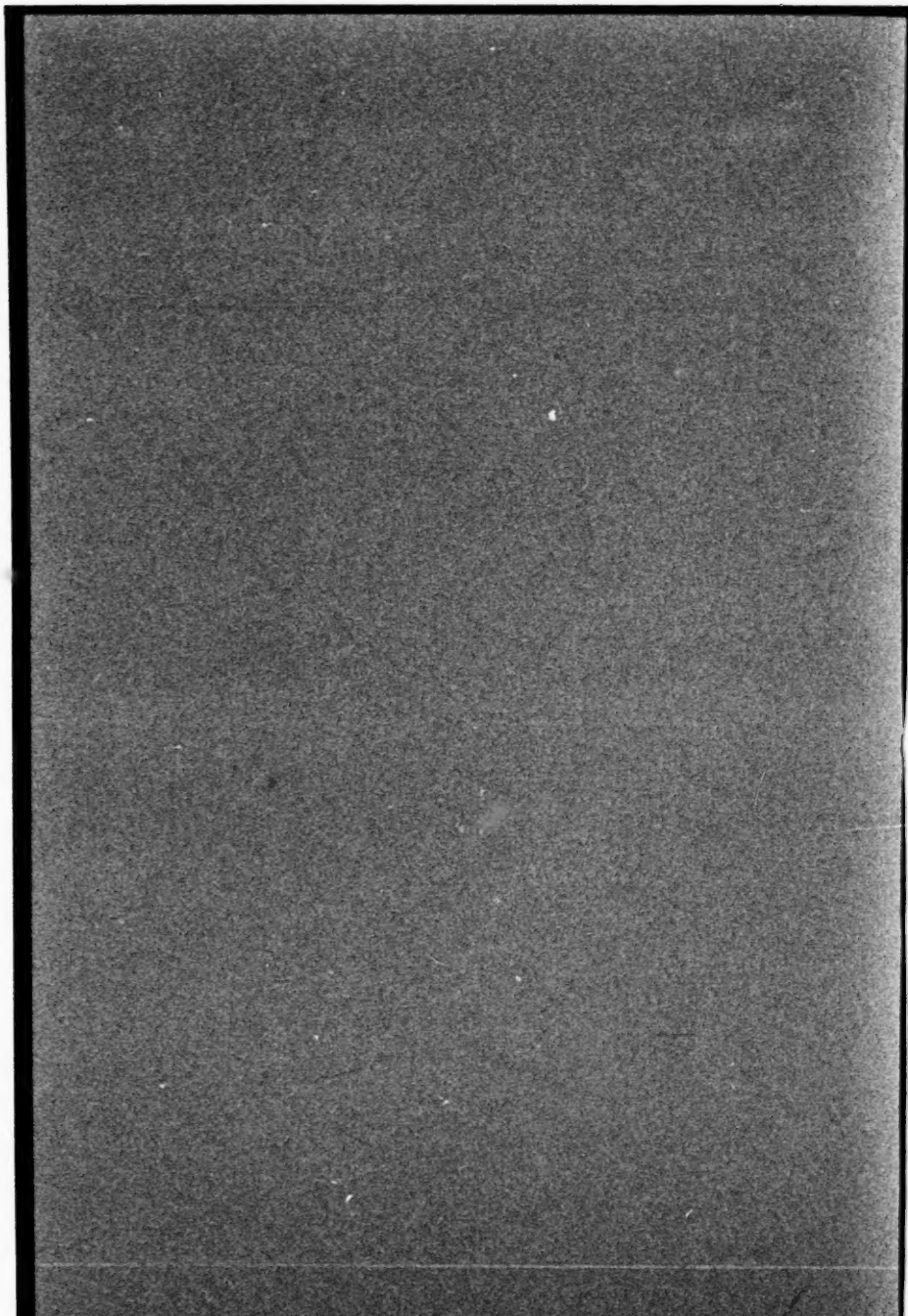
4. Supra, n. 2.

5. Statistics compiled apply only to those offices affected by the statute under question in this case.

APPENDIX



APPENDIX A

TO

BRIEF FOR RESPONDENTS IN OPPOSITION

Appendix A—Exhibit presented at the hearing before the New Mexico Supreme Court, April 7, 1972.

Compiled by the Office of the Secretary of State of New Mexico, Bureau of Elections, April 4, 1972.

A2

UNITED STATES SENATOR

Annual Salary: $42,500

FILING FEES PD.	NAME	ADDRESS	PARTY AFFILIATION	NO FEES PAID
	PHYLLIS B. NORMAN	3082 Woodland Road Los Alamos, N.M.	Democrat	$ 2,550
	E. LEE FRANCIS	Box 67 Cubero, N.M.	Republican	$ 2,550
	ORLIN G. COLE	4713 Overland, N.E. Albuquerque, N.M.	Democrat	$ 2,550
$2,550	*THOMAS G. MORRIS	5400 Lomas, N.E. Albuquerque, N.M.	Democrat	
	TIMOTHY M. McDONALD	409 Girard Blvd., S.E. Albuquerque, N.M.	Democrat	$ 2,550
	DAVID F. CARGO	Rt. 1, Box 204F Santa Fe, N.M.	Republican	$ 2,550
	THOMAS S. MACAIONE	988 Acequia Madre Santa Fe, N.M.	Democrat	$ 2,550
	JOHN H. MEIER	2205 Ambassador Rd. Albuquerque, N.M.	Democrat	$ 2,550
	JOSEPH M. KURCABA	9620 Euclid, N.E Albuquerque, N.M.	Republican	$ 2,550
	CRISIFORO GALLEGOS	Questa New Mexico	Republican	$ 2,550
	EMMA ALICE KREDAN	7417 Arvada, N.E. Albuquerque, N.M.	Democrat	$ 2,550
	ANSELMO A. CHAVEZ	1613 Walter, S.E. Albuquerque, N.M.	Democrat	$ 2,550
	BENVIZ M. CHAVEZ	515 North Orchard Farmington	Republican	$ 2,550
	STELLA M. MONTOYA	5523 Indian School, N.E. Albuquerque, N.M.	Republican	$ 2,550
$2,550	SUBTOTAL FEES PAID		SUBTOTAL NO FEES PAID	$33,150.

*Refund from petitioned no. of total valid signatures (561,550)

A3

UNITED STATES SENATOR

FILING FEES PD.	NAME	ADDRESS	PARTY AFFILIATION	NO. FEES PAID
	FILBERT A. JARAMILLO	512 Headingly, N.W. Albuquerque, N.M.	Democrat	$ 2,550
	WARREN F. LEE	1016 Vista Grande Drive N.W. Albuquerque, N.M.	Democrat	$ 2,550
$ 2,550	*JESSE D. KORNEGAY	907 Old Santa Fe Trail Santa Fe, N.M.	Democrat	
	EDDIE R. BARBOA	2929 Barcelona, S.W. Albuquerque, N.M.	Democrat	$ 2,550
	JACK R. HAIL	Box 284 Hagerman, N.M.	Democrat	$ 2,550
	JOSE ARSENIO ROMERO	Rt. 2, Box 75 (Agua Fria) Santa Fe, New Mexico	Democrat	$ 2,550
	CHARLES DONALDSON	Box 569 Santa Fe, N.M.	Democrat	$ 2,550
	WILLIAM J. CRONA, JR.	1115 Fruit Avenue, N.W. Albuquerque, N.M.	Democrat	$ 2,550
	NORBERT J. McGOVERN	11016 Phoenix, N.E. Albuquerque, N.M.	Democrat	$ 2,550
	ARMANDO LARRAGOITE, JR.	2100 Conejo Drive Santa Fe, N.M.	Democrat	$ 2,550
	WILLIAM J. DAHNKE	P. O. Drawer X Albuquerque, N.M.	Republican	$ 2,550
	DAVID ORTEGA	118 W. Ross Avenue Belen, N.M.	Democrat	$ 2,550
	MERRILL D. JOHNS, JR.	Box 2425 Santa Fe, N.M.	Republican	$ 2,550
	MIKE LONDON	220 Copper, N.W. Albuquerque, N.M.	Republican	$ 2,550
	TONY MIGNARDOT	P. O. Box 5073 Santa Fe, N.M.	Republican	$ 2,550
	VALENTINO T. DeLAO	1207 Presidio Pl., S.W. Albuquerque, N.M.	Republican	$ 2,550
$ 2,550	SUBTOTAL FEES PAID		TOTAL NO FEES PAID	$38,250

*Filing fees paid based on 6% of first year's salary ($42,500)

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UNITED STATES SENATOR

PAID? (Y/N)	NAME	ADDRESS	AFFILIATION	FEE
	ERNESTINE D. CHINO	P. O.Box 5312 Santa Fe, N.M.	Democrat	$ 2,550
	REGINALDO ESPINOSA, II	P. O. Box 206 Espanola, N.M.	Democrat	$ 2,550
	MAURICE MALCOLM DILLON	6305 Camino Ocho, S.W. Albuquerque, N.M.	Democrat	$ 2,550
	CLOVIS O. HERRERA	P. O. Box 1 Los Lunas, N.M. 87031	Democrat	$ 2,550
	RAYMOND E. GARVEY	1104 Apt. Lead Ave., S.W. Albuquerque, N.M.	Democrat	$ 2,550
	DAVID L. NORVELL	2329 Calle Halcon Santa Fe, N.M.	Democrat	$ 2,550
$2,550	*JACK DANIELS	P. O. Box 1258 623 E. Baja Drive Hobbs, N.M.	Democrat	
	ROBERT A. MONDRAGON	Rt. 1, Box 139A Santa Fe, N.M.	Democrat	$ 2,550
	CLARENCE GAILARD	Rt. 3, Box 3105A Albuquerque, N.M.	Democrat	$ 2,550
$2,550	*PETE V. DOMENICI	720 Monroe, N.E. Albuquerque, N.M.	Republican	
$5,100	SUBTOTAL FEES PAID		SUBTOTAL NO FEES PAID	$20,400
$10,200	GRAND TOTAL: FEES PAID		GRAND TOTAL: NO FEES PAID	$91,800

A5

STATE OF NEW MEXICO
OFFICE OF THE SECRETARY OF STATE
BUREAU OF ELECTIONS

FILING DAY (3-8-21)
APRIL 4, 1972

FILING FEES PD.	NAME	ADDRESS	PARTY AFFILIATION	NO FILING FEES PD
$ 2,550	*GEORGE A. GONZALES	122 Barranca Rd. P. O. Box 2058 Santa Fe, N.M.	Democrat	
$ 2,550	*MANUEL LUJAN, JR.	1209 California, N.E. Albuquerque, N.M.	Republican	
	MICHAEL ALNRID	1608 Escalante, S.W. Albuquerque, N.M.	Democrat	$ 2,550
	SIBY N. LUCERO	P.O. Box 567 Ojo Caliente, N.M.	Democrat	$ 2,550
	JACKIE SUASO	1328 Maclovia Santa Fe, N.M.	Democrat	$ 2,550
	TERRY BROWN	351 E. Garcia Santa Fe, N.M.	Democrat	$ 2,550
	THEODORE R. WILSON	3014 Calle Quieta Santa Fe, N.M.	Democrat	$ 2,550
	SPARKLE PLENTY	P. O. Box 1635 Santa Fe, N.M.	Democrat	$ 2,550
$ 2,550	*EUGENE GALLEGOS	P.O. Box 2498 Santa Fe, N.M.	Democrat	
	JOHN W. FLYNN	830 Zia Road Santa Fe, N.M.	Democrat	$ 2,550
	RICHARD MARTINEZ	1007 Shirley,N.E. Albuquerque, N.M.	Republican	$ 2,550
$ 7,650	TOTAL FEES PAID		TOTAL FEES NOT PAID	$ 20,400

*Filing fees paid based on 6% of first year's salary ($42,500.00)

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STATE OF NEW MEXICO
OFFICE OF THE SECRETARY OF STATE
BUREAU OF ELECTIONS

FILING DAY (3-8-21)
April 4, 1972

UNITED STATES REPRESENTATIVE (DISTRICT 2)

FILING FEES PD.	NAME	ADDRESS	PARTY AFFILIATION	NO FILING FEES PD.
$ 2,550	*HAROLD RUNNELS	210 South 7th Lovington, N.M.	Democrat	
	HOWARD M. OVERSTREET	402 E. 3rd Avenue P. O. Box 1081 Truth or Consequences, N.M.	Republican	$ 2,550
	REUBEN E. PAINEY	P. O. Box 672 Truth or Consequences, N.M.	Republican	$ 2,550
	GEORGE E. PRESSON	713 W. 7th Street Silver City, N.M.	Republican	$ 2,550
$ 2,550	TOTAL FEES PAID		TOTAL FEES NOT PAID	$ 7,650

*Filing Fees Paid based on 6% of first year's salary ($42,500.00)

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STATE OF NEW MEXICO
OFFICE OF THE SECRETARY OF STATE
BUREAU OF ELECTIONS

STATE CORPORATION COMMISSION

FILING FEES PD.	NAME	ADDRESS	PARTY AFFILIATION	FILING FEES NOT PD.
	ALFRED J. ARMIJO	1701 Princeton, S.E. Albuquerque, N.M.	Democrat	$ 1,200
✓	PATRICK H. O'HEARN	3705 Campus, N.E. Albuquerque, N.M.	Democrat	$ 1,200
✓	LLOYD W. MILES	12201 Lomas, N.E. Albuquerque, N.M.	Democrat	$ 1,200
	LANGDON D. HARRISON	5327 Montgomery, N.E. Albuquerque, N.M.	Democrat	$ 1,200
✓	SANDY MARTINEZ	1214 National Las Vegas, N.M.	Democrat	$ 1,200
1,200*	JAKE BARTH	P. O. Box 201, Fairview Station Espanola, N.M.	Democrat	
1,200*	BEN F. RAMSEY	3213 Siringo Road Santa Fe, N.M.	Democrat	
	JOE L. GARNER	5313 Mescalero, N.E Albuquerque, N.M.	Democrat	$ 1,200
1,200*	COLUMBUS FERGUSON	P. O. Box 716 Taos, N.M.	Democrat	
1,200*	M. L. HAPPY APODACA	P. O. Box 68 Mesilla, N.M.	Democrat	
✓	JOE M. BARELA	1513 Osage Rd., S.W Albuquerque, N.M.	Democrat	$ 1,200
	FRANK S. HARLOW, JR.	923 Corrillos Rd., No. 4 Santa Fe, N.M.	Republican	$ 1,200
	H. LOUIS WEBER	7101 Cerrillos Road Rt. 2, Box 344 Santa Fe, N.M.	Republican	$ 1,200
	LARRY HEMS	1005 West Buena Vista Roswell, N.M.	Republican	$ 1,200
1,000	TOTAL FEES PAID		TOTAL FEES NOT PAID	$12,000

*Filing fees paid based on 6% of first year's salary ($20,000.00)

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STATE OF NEW MEXICO
OFFICE OF THE SECRETARY OF STATE
BUREAU OF ELECTIONS

NEW MEXICO SUPREME COURT JUSTICE

FILING FEES PAID	POSITION NO.	NAME	ADDRESS	PARTY AFFILIATION	FILING FEES NOT PAID
	1	Joe L. Martinez	928 Avenida Manana Albuquerque, N. M.	Democrat	$1770
	1	Peter E. Gallagher	2509 Morrow, N.E. Albuquerque, N. M.	Democrat	$1770
770	*1	J. C. Compton	501 Armenta Santa Fe, N. M.	Democrat	
770	*1	Finis Leroy Heidel	Box 1298 Lovington, N. M. 88260	Democrat	
770	*1	W. Peter McAtee	Box 568 Albuquerque, N. M. 87103	Democrat	
	1	Charles M. Tansey	P. O. Box 659 Farmington, N. M. 87401	Republican	$1770
	2	James M Scarborough	P. O. Box 71 Espanola, N. M. 87532	Democrat	$1770
	2	Oliver E. Payne	802 Waldo Street Santa Fe, N. M. 87501	Democrat	$1770
770	*2	Samuel Z. Montoya	216 Sombrio Drive Santa Fe, N. M. 87501	Democrat	
	2	J. Ernest Corey	3200 Valencia Drive, N.E. Albuquerque, N. M.	Republican	$1770
	2	Thomas E. Jones	Suite 1503 First National Bank Building, East Albuquerque, N. M. 87108	Republican	$1770

000.00 SUB TOTAL FEES PAID SUB TOTAL FEES NOT PAID $12,390

* Filing Fees Paid Based on 6% of the First Year's Salary ($29,500.00)

STATE OF NEW MEXICO
OFFICE OF THE SECRETARY OF STATE
BUREAU OF ELECTIONS

NEW MEXICO JUSTICE OF THE COURT OF APPEALS

FILING FEES PAID	TERM	NAME	ADDRESS	PARTY AFFILIATION	FEES NOT P
$1680	*8 yr.	Joe W. Wood	1922 Fort Union Drive Santa Fe, N. M. 87501	Democrat	
		NONE	NONE	REPUBLICAN	
	4yr.	Ramon Lopez	General Delivery Algodones, N. M.	Democrat	$1680
	4yr.	Ellis J. French	7705 Marble, N.E. Albuquerque, N. M. 87103	Democrat	$1680
$1680	*4yr.	Paul Armand Phillips	9800 Chapala Drive, N.E. Albuquerque, N. M.	Democrat	
	4yr.	Jack Underwood	P. O. Box 1366 Ruidoso, N. M. 88345	Democrat	$1680
$1680	*4yr.	Ray C. Cowan	P. O. Box 2008 Santa Fe, N. M. 87501	Democrat	
		NONE	NONE	REPUBLICAN	
	2yr.	William J. Torrington	1101 Western Meadows Alameda, N. M. 87114	Democrat	$1680
$1680	*2yr.	Lewis R. Sutin	P. O. Box 2008 Santa Fe, N. M. 87501	Democrat	
	2yr.	Edwin W. Stockly	P. O. Box 29 Los Alamos, N. M.	Republican	$1680

$6720.00 SUB TOTAL FEES PAID SUB TOTAL FEES NOT PAID $8400.

* Filing Fees Paid Based on 6% of the First Year's Salary ($2800.00)

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STATE OF NEW MEXICO
OFFICE OF THE SECRETARY OF STATE
BUREAU OF ELECTIONS

NEW MEXICO DISTRICT JUDGES
Salary: $27,000.00

FILING FEE PD.	DISTRICT NO.	NAME	ADDRESS	PARTY AFFILIATION	FEE NOT PAID
	1-Div. 1	NONE	NONE	REPUBLICAN	
$ 1,620	*1-Div. 1	Thomas A. Donnelly	865 Don Diego Santa Fe, N. M.	Democrat	
	1-Div. 1	Lyle E. Teutsch, Jr.	P. O. Box 4086 Santa Fe, N. M. 87501	Democrat	$ 1,620
	1-Div. 2	NONE	NONE	REPUBLICAN	
$ 1,620	*1-Div. 2	Edwin L. Felter	P. O. Box 186 Santa Fe, N. M. 87501	Democrat	
	1-Div. 3	NONE	NONE	REPUBLICAN	
	1-Div. 3	Santiago E. Campos	P. O. Box 2268 Santa Fe, New Mex. 87501	Democrat	1,620
$ 1,620	*2-Div. 1	Frederick Martin Mowrer	10016 Inca Court, N.E. Albuquerque, N.M. 87111	Republican	
$ 1,620	*2-Div. 1	Harry E. Stowers, Jr.	1408 Wellesley Drive, N.E. Albuquerque, N. M.	Democrat	
$ 1,620	*2-Div. 2	H. Richard Blackhurst	4909 Guadalupe Trail, N.W. Albuquerque, N. M. 87107	Republican	
	2-Div. 2	Tom Clear	7112 Aztec Road, N.E. Albuquerque, N. M. 87110	Republican	1,620
	2-Div. 2	Scott H. Mabry	1318 Alvarado Drive, N.E. Albuquerque, N. M. 87110	Democrat	1,620
	2-Div. 2	Joseph B. Zucht	3201 Valencia, N.E. Albuquerque, N. M. 87110	Democrat	1,620
$ 1,620	*2-Div. 2	Joseph F. Baca	4720 Douglas MacArthur, N.E. Albuquerque, N. M.	Democrat	
	2-Div. 3	Dale B. Dilts	5706 Hannett, N.E. Albuquerque, N. M. 87110	Republican	1,620
$ 1,620	*2-Div. 3	Joseph C. Ryan	Star Route 208 AB Alameda, N. M.	Republican	
	2-Div. 3	James D. Sidwell	456 Val Verde, S.E. Apt. 7 Albuquerque, N. M. 87108	Democrat	1,620
	2-Div. 3	Terrance L. Dolan	3213 Alvarado, N.E. Albuquerque, N. M. 87108	Democrat	1,620
$ 1,620	*2-Div. 3	Thomas E. Davis	1516 Richmond Drive, N.E. Albuquerque, N. M. 87106	Democrat	
	2-Div. 4	B. Thomas May	200 Simms Building Albuquerque, N. M. 87101	Republican	1,620
$ 1,620	*2-Div. 4	William F. Riordan	8804 Hilton, N.E. Albuquerque, N. M. 87111	Republican	
	2-Div. 4	Addison L. Strong	1415 Stanford, N.E. Albuquerque, N. M.	Republican	1,620
	2-Div. 4	Samuel Mandel	7209 Ottawa Road, N.E. Albuquerque, N. M. 87110	Democrat	1,620
$ 1,620	*2-Div. 4	Mary C. Walters	4108 Delamar, N.E. Albuquerque, N. M.	Democrat	
$ 1,620	*2-Div. 5	Gerald D. Fowlie	1615 San Patricio, S.W. Albuquerque, N. M. 87104	Republican	
$ 1,620	*2-Div. 5	Richard B. Traub	1404 Solano Court, N.E. Albuquerque, N. M.	Democrat	
$19,440	Subtotal Fees Paid			Subtotal fees not pd.	$17,820

*Filing fees paid based on 6% of first year's salary ($27,000.00)

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STATE OF NEW MEXICO
OFFICE OF THE SECRETARY OF STATE
BUREAU OF ELECTIONS

NEW MEXICO DISTRICT JUDGES

FILING FEES PD.	DISTRICT NO.	NAME	ADDRESS	PARTY AFFILIATION	FEE NOT PAID
$ 1,620	*2-Div. 6	Paul F. Larrazolo	4716 Rovene Avenue, N.E. Albuquerque, N. M. 87110	Republican	
	2-Div. 6	NONE	NONE	DEMOCRAT	
	2-Div. 7	David W. King	820 Monroe, N.E. Albuquerque, N. M. 87110	Republican	1,620
$ 1,620	*2-Div. 7	James A. Maloney	1324 Morningside, N.E. Albuquerque, N. M. 87110	Democrat	
$ 1,620	*2-Div. 8	H. Vern Payne	3424 Georgia Street, N.E. Albuquerque, N. M. 87110	Democrat	
$ 1,620	*2-Div. 8	Quincy D. Adams	902 Morningside, N.E. Albuquerque, N. M.	Democrat	
	2-Div. 8	NONE	NONE	REPUBLICAN	
	3-Div. 1	NONE	NONE	REPUBLICAN	
$ 1,620	*3-Div. 1	E. Forrest Sanders	P. O. Box 1387 Las Cruces, N. M.	Democrat	
	3-Div. 2	NONE	NONE	REPUBLICAN	
$ 1,620	*3-Div. 2	Garnett R. Burks, Jr.	Dona Ana County Courthouse Las Cruces, N. M. 88001	Democrat	
	4-No Div.	NONE	NONE	Republican	
	4-No Div.	Joe Angel	Montezuma, N. M. 87731	Democrat	1,620
	5-Div. 1	NONE	NONE	REPUBLICAN	
$ 1,620	*5-Div. 1	D. D. Archer	P. O. Box 156 Artesia, N. M. 88210	Democrat	
	5-Div. 2	Paul Snead	P. O. Box 1776 Roswell, N. M. 88201	Democrat	1,620
	5-Div. 2	NONE	NONE	REPUBLICAN	
$ 1,620	* 5-Div. 3	Kermit E. Nash	P. O. Box 2099 Hobbs, New Mexico 88240	Democrat	
	5-Div. 3	NONE	NONE	REPUBLICAN	
	6-No Div.	NONE	NONE	REPUBLICAN	
1,620	* 6-No Div.	Norman Hodges	P. O. Box 390 Silver City, N.M. 88061	Democrat	
	7-No Div.	David Eldon Douglas	P. O. Box R Socorro, N. M. 87801	Republican	1,620
1,620	*7-No Div.	Edmund H. Kase III	P. O. Box 1276 Socorro, N. M.	Democrat	
	8-No Div.	NONE	NONE	REPUBLICAN	
1,620	*8-No Div.	John B. Wright	P. O. Box 160 Raton, N. M. 87740	Democrat	
	9-No Div.	NONE	NONE	REPUBLICAN	
1,620	* 9-No Div.	James C. Compton	P. O. Box 809 Portales, N. M. 88130	Democrat	
1,620	* 9-No Div.	Dee C. Blythe	P. O. Box 98 Clovis, N. M. 88101	Democrat	
21,060	Subtotal Fees Paid		Subtotal fees not paid:		$ 6,480

*Filing fees paid based on 6% of first year's salary ($27,000.00)

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STATE OF NEW MEXICO
OFFICE OF THE SECRETARY OF STATE
BUREAU OF ELECTIONS

NEW MEXICO DISTRICT JUDGES

ING ES PD.	DISTRICT NO.	NAME	ADDRESS	PARTY AFFILIATION	FEES NOT PAID
1,620	*10-No Div.	Eugene E. Brockman	P. O. Box 984 Tucumcari, N. M. 88401	Republican	
1,620	*10-No Div.	Robert M. Rowley	P. O. Box 927 Tucumcari, N. M. 88401	Democrat	
	10-No Div.	Manford William Rainwater	P. O. Box 1268 Tucumcari, N. M. 88401	Democrat	$ 1,620
1,620	*10-No Div.	Stanley F. Frost	P. O. Box 784 Tucumcari, N. M. 88401	Democrat	
	11-Div. 1	NONE	NONE	REPUBLICAN	
1,620	*11-Div. 1	James W. Musgrove	P. O. Box 568 Aztec, N. M.	Democrat	
	11-Div. 2	NONE	NONE	REPUBLICAN	
1,620	*11-Div. 2	Frank B. Zinn	P. O. Box 460 Gallup, N. M. 87301	Democrat	
	12-No Div.	NONE	NONE	REPUBLICAN	
	12-No Div.	George L. Zimmerman	P. O. Box 38 Alamogordo, N. M. 88310	Democrat	$ [illegible]
1,620	*12-No Div.	Richard A. Stanley	P. O. Box 636 Alamogordo, N. M. 88310	Democrat	
1,620	*13-No Div.	Verne Hale	P. O. Box 1028 Grants, N. M. 87020	Republican	
1,620	*13-No Div.	Filo M. Sedillo	P. O. Box 777 Los Lunas, N. M. 87031	Democrat	
1,620	*13-No Div.	Joe A. Duran	North Star Route, Box 204-B Corrales, N. M.	Democrat	
14,580		Subtotal Fees Paid		Subtotal fees not paid:	$ [illegible]
55,080		GRAND TOTAL FEES PAID		GRAND TOTAL FEES NOT PD.	$27,[illegible]

*Filing fees paid based on 6% of first year's salary ($27,000.00)

STATE OF NEW MEXICO
OFFICE OF THE SECRETARY OF STATE
BUREAU OF ELECTIONS

NEW MEXICO DISTRICT ATTORNEY

FILING FEES PD.	DISTRICT NO.	NAME	ADDRESS	PARTY AFFILIATION	FEES NOT PAID
	1	NONE	NONE	REPUBLICAN	
$ 180	*1	Joe Cruz Castellano, Jr.	P. O. Box 1453 Santa Fe, N. M. 87501	Democrat	
$ 180	*1	James C. Thompson	P. O. Drawer JJ Espanola, N. M.	Democrat	
	2	Lawrence T. Buchmiller	7713 El Conde, N.E. Albuquerque, N. M.	Republican	$540
$ 540	*2	Alexander F. Sceresse	1508 Indiana, N.E. Albuquerque, N. M.	Democrat	
$ 180	*3	H. Gregg Privette	Suite 1016 First National Tower, Las Cruces, N. M.	Republican	
$ 180	*3	E. H. Williams, Jr.	P. O. Box 1333 Las Cruces, N. M. 88001	Democrat	
$ 180	*4	Jose E. Armijo	500 Reynolds Avenue Las Vegas, N. M. 87001	Republican	
$ 180	*4	Donaldo A. Martinez	Las Vegas County Courthouse Las Vegas, N. M. 87001	Democrat	
	5	NONE	NONE	REPUBLICAN	
$ 180	*5	Pat Hanagan	P. O. Box 1513 Roswell, N. M. 88201	Democrat	
	6	NONE	NONE	REPUBLICAN	
$ 180	*6	E. C. Serna	16 Crestway Silver City, N. M. 88061	Democrat	
	7	Hal W. Everett	501 Main, P. O. Box 1050 Truth or Consequences, N. M.	Republican	$180
$ 180	*7	Paul Marshall	P. O. Box 1412 Socorro, N. M. 87801	Democrat	
	7	Claron Earl Waggoner	P. O. Box 917 Socorro, N. M. 87801	Democrat	$180
	8	NONE	NONE	REPUBLICAN	
$ 180	*8	John E. Hobbes	Cimarron, N. M.	Democrat	
	9	NONE	NONE	REPUBLICAN	
	9	Fred T. Hensley	P. O. Box 119 Portales, N. M. 88130	Democrat	$180
$ 180	*9	Morris D. Stagner	P. O. Box 925 Clovis, N. M. 88101	Democrat	
	10	NONE	NONE	REPUBLICAN	
$ 180	*10	Norman E. Runyan	P. O. Box 927 Tucumcari, N. M. 88401	Democrat	
	11	Richard G. Boren	931 Crestview Drive Farmington, N. M. 87401	Republican	$180
180	*11	Louis E. DePauli	P. O. Drawer 38 Gallup, N. M. 87301	Democrat	
	12	NONE	NONE	REPUBLICAN	
180	*12	Norman D. Bloom, Jr.	R.R.1, Box 51 (No. Florida Ave) Alamogordo, N. M. 88310	Democrat	
3,060		Subtotal fees paid		Subtotal fees not paid	$1,260

*Filing fees paid based on 6% of first year's salary ($3,000) Every county except Bernalillo ($5,000)

STATE OF NEW MEXICO
OFFICE OF THE SECRETARY OF STATE
BUREAU OF ELECTIONS

NEW MEXICO DISTRICT ATTORNEY

FILING FEES PD.	DISTRICT NO.	NAME	ADDRESS	PARTY AFFILIATION	FEE NOT PAID
	13	William Paul Kearns, Jr.	P. O. Box 907 Grants, N. M. 87020	Republican	$180
180	*13	Frederick B. Howden	P. O. Box 718 Los Lunas, N. M.	Democrat	
180	*13	George H. Perez	El Banco Apartments Calle del Banco Bernalillo, N. M.	Democrat	

350 Subtotal fees paid — Subtotal fees not paid $ 180

3,420 GRAND TOTAL FEES PAID — GRAND TOTAL FEES NOT PD. $1,440

APPENDIX B

TO

BRIEF FOR RESPONDENTS IN OPPOSITION

No. 9454

STATE OF NEW MEXICO, ex rel.
A. L. HAPPY APODACA, and
A. L. HAPPY APODACA,
Relators,

vs.

BETTY FIORINA, Secretary of State of the State of New Mexico, and DAVID L. NORVELL, Attorney General of the State of New Mexico,
Respondents.

ORIGINAL MANDAMUS PROCEEDINGS

STANDLEY, WITT & QUINN
BIGBEE, BYRD, CARPENTER & CROUT
PAUL D. GERBER
Santa Fe, New Mexico — Attorneys for Relators

DAVID L. NORVELL, Attorney General
WILLIAM S. DIXON, Special Asst. Atty. Gen.
Albuquerque, New Mexico — Attorneys for Respondents

Relators petitioned for a writ of mandamus requiring Respondent Secretary of State to certify only the names of persons who paid the filing fees prescribed by §3-8-26A, N.M.S.A., 1953 (Repl. Vol. 1, 1970) as candidates in the primary election scheduled to be held June 6, 1972, or, alternatively, to certify only those who would tender such fees within such time and under such conditions and restrictions as we might prescribe. It appears from the petition that the Respondent Attorney General has advised the Secretary of State to proceed in a different manner.

We issued our Alternative Writ which, following a lengthy evidentiary hearing and elaborate briefs and arguments of counsel, was made permanent with provision for permitting persons who had attempted to file as candidates without paying filing fees to pay the fees to the appropriate authority within a prescribed time. Finally, our permanent writ made it clear that Messrs. Orlin Cole, Malcolm Dillon and Clarence Gailard were unaffected by anything we said.

A complex course of events has gone before. In Federal District Court, Messrs. Dillon, Cole and Gailard brought an action against Mrs. Fiorina in which they asserted a desire to become candidates for the Democratic nomination to the office of United States Senator, claiming to be unable to pay the filing fees required by §3-8-26A, supra. As a result, they claimed to be deprived of equal protection of the laws. Dillon v. Fiorina, U.S.D.C. N.M., No. 9340 Civil, issued March 24, 1972.

Trial was had before a three-judge panel. Attorney General Norvell purportedly defended Mrs. Fiorina. No evidence was tendered to show that the filing fee is "reasonably necessary to the accomplishment of legitimate state objectives." The three-judge panel handed down a Memorandum Opinion and entered a Final Judgment restraining Mrs. Fiorina from enforcing §3-8-26A, supra, against the mentioned gentlemen if any of them "files an application to become a candidate for nomination for the office of United States Senator in the next primary election."

The Attorney General did not appeal Dillon nor seek a stay. He has not appeared before us in these proceedings.

On March 20, 1972, Respondent Norvell issued a Memorandum Directive on primary election procedures to the Governor and Mrs. Fiorina which instructed Mrs. Fiorina

that "no filing fees should be assessed any candidate, otherwise qualified for the offices covered by Section 3-8-26(A) and (B) * * *." Section 3-8-26A encompasses all salaried officers to be elected in the upcoming primary. It does not relate to members of the legislature, members of the State Board of Education and County Surveyors, offices with which we are not here concerned.

Filing Day, April 4, 1972, was not uneventful. For the office of United States Senator, twenty-eight candidates filed for the Democratic nomination and twelve for the Republican. Of these, three Democrats and one Republican paid filing fees.

Similar activity took place in the races for both congressional districts, the judicial races, and so on through the list. In the race for State Corporation Commission, eleven Democrats and three Republicans filed, of whom four Democrats, including Relator, paid filing fees.

Thereafter, on April 7, 1972, Relator petitioned for an alternative writ, which was issued on the same day.

Article VII, Section 1 of the New Mexico Constitution provides in pertinent part:

> "The legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections, and guard against the abuse of elective franchise."

In Bullock v. Carter, 40 U.S.L.W. 4211 (1972), the court said:

> "The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. *Jenness* v. *Fortson*, 403 U.S., at 442; *Williams* v. *Rhodes*, 393 U.S., at 32. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and

assure that the winner is the choice of a majority, or at least a strong plurality, of those voting without the expense and burden of runoff elections. Although we have no way of gauging the number of candidates who might enter primaries in Texas if access to the ballot were unimpeded by the large filing fees in question here, we are bound to respect the legitimate objectives of the State in avoiding overcrowded ballots. Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. *Jenness* v. *Fortson*, 403 U.S., at 442."

The Chief Justice recognized in a subsequent statement that it is the "serious candidates" with whom we are concerned. He perceptively pointed out that:

"* * * And even assuming that every person paying the large fees required by Texas law takes his own candidacy seriously, that does not make him a 'serious candidate' in the popular sense. * * *"

Taken as a whole, having in mind the constitutional mandates laid down by the New Mexico Constitution, the recognition of the legitimate objectives of avoiding overcrowded ballots and the Chief Justice's comments concerning "serious candidates," the reasonable result is that it is not merely the frivolous or fraudulent candidacies which may constitutionally be excluded, but also those candidates who are not "serious."

We accept the New Mexico constitutional mandate and the pronouncements of the United States Supreme Court in Bullock as our guidelines in arriving at our decision.

The precise question presented in this case for determination concerns §3-8-26(A), supra, which provides:

"The filing fee for each of the following offices is:

"A. All officers receiving salary
6% of the first year's salary."

The Respondents urge that this section is unconstitutional and void as a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. This enactment of the statute constitutes New Mexico "State action." Bullock v. Carter, supra.

For good or ill, this is an elected court. It is thus inevitable that no matter what result we might have reached, there would be those who would say that we had favored one candidate over another, or one party over another, or one social philosophy over another. This is a cross we accepted with our certificates of election. It is, nevertheless, true that our selective process has placed us in contact with the stream of governmental and political life in New Mexico, and in touch with its realities and practical concepts.

New Mexico political history and legislative attempts to regulate elections are fascinating subjects. Three percent filing fees have been tried but found wanting. The modest expenditure was not sufficient to preclude the filing of "stooge" candidates. In New Mexico political parlance, a "stooge candidate" is one who is filed by, or whose filing is caused or procured by, a candidate or his adherents with a view of dividing the vote which would presumably be garnered by his opponent. Such efforts often developed along ethnic lines. For instance, a Spanish-speaking candidate would be filed to "split the native vote" to the supposed disadvantage of a serious contender of that lineage, which would be countered by filing a candidate "to split the Anglo vote," and so on and on.

This was an evil which resulted in confusion of the electorate and an abuse of the elective franchise.

The same abuses have been noted in respect to nominating petitions. In Bokum v. Romero, No. 5307 on the docket of this court, it was asserted that nominating petitions containing 1,067 signatures had been signed with the name of the candidate and the office sought left blank, or that the name and office had been erased and the petitions then completed, using the name of an individual apparently seeking the office of governor. The point of this evolution was popularly supposed to be to "split the Anglo vote." This court ruled the candidate off the ballot, and the next legislature returned to a pre-primary arrangement.

The evolution of legislative acts regulating the means of securing party nominations to office is also of interest, reflecting the efforts of the legislature to comply with the constitutional mandate set forth in Article VII, §1 of the New Mexico Constitution to eliminate abuses and to refine and perfect the selective process.

Prior to 1938, nomination was by convention. In that year, a primary law was adopted which required a filing fee of three percent of the first year's salary. The search for a means of confining the ballot to serious candidates has led us from the original petitions with a three percent fee through pre-primary conventions with a three percent fee after convention selection (and nominating petitions with a similar fee as an alternate to convention selection) to a declaration of candidacy with a three percent fee without petitions.

Ultimately, passing over various intervening legislative episodes, §3-8-26A was passed, which requires a filing fee of six percent of the first year's salary, accompanied by §3-8-27, N.M.S.A., 1953 (Repl. Vol. 1, 1970), which provides

for refund of one-half of the filing fee to a candidate who receives at least fifteen percent of the vote cast by members of his party in the race for the office he seeks.

Radically different from the Texas system recounted in Bullock is the filing fee structure in New Mexico and the use made of such fees.

In New Mexico, the parties do not pay for the primary. Rather than a sum arbitrarily fixed by party officials, a statutory six percent of the first year's salary must be initially paid. For candidates receiving fifteen percent of his party's votes in that race, one-half is refunded, leaving a net of three percent.

One-half of the filing fees of the serious candidates and all of the filing fees of candidates who do not receive fifteen percent of the vote are apportioned among the counties to partially defray the costs of conducting the primary election at the county level. In the 1970 primary, for example, $52,140 came from this source. Even at the county level, the fees do not cover the entire costs. Rather, the election fund receives revenues from other sources, including property taxes. In 1970, these funds amounted to $107,969. Thus, of the total sums which went into the county election funds for expenses at the county level, less than one-third was received from filing fees paid to the Secretary of State.

Moreover, no portion of such fees is used to defray the expenses of the Secretary of State's office, the principal function of that office being the administration and coordination of elections, (Chapter 3, Article 2, et seq., N.M.S.A. 1953), or of the election bureau, a department or division of that office. The Secretary of State's office is supported by appropriations from the State's general fund.

Thus, as contrasted with Texas, the filing fees of candidates do not pay for primaries, except in part. Rather, the primary process is subsidized in substantial, though undisclosed, amounts by the State and various other sources of revenues which are made available for such purposes.

It is nevertheless true that if budgeted sums are not received by the counties from candidates' filing fees, the conduct of the election will deplete other funds of the counties, requiring curtailment of services or diminution of other expenses such as personnel or salary cutbacks in most, if not all, of the counties.

Sections 3-8-26 and 3-8-27, supra, represent in significant measure the efforts of our legislature to achieve the legitimate objective of avoiding overcrowded ballots and protecting the integrity of the state's political processes.

A number of conclusions may be drawn from the refund statute. First, it obviously, by imposing a risk, seeks to discourage other than serious candidates. This is a legitimate objective pursued in a reasonable way. Respondents have inveighed against the risk element. Enterprises of consequence are usually accompanied by risk. We perceive no reason why elections should be otherwise.

We further can, and do, construe the refund statute as specifying the legislative measure by which to gauge a serious candidate, viz., one who garners fifteen percent of the vote. We regard this determination as being liberal. The percentage is very modest. It permits six serious candidates to contend for one office. This is ample and consistent with our constitutional mandate and Bullock.

Thus, as to the New Mexico scheme of filing fees, we first hold that the amount required to be paid involves no element of arbitrary or capricious discrimination against or

among candidates, as was the case in Bullock. We further hold, in light of present day monetary values, that the amounts are by no means unreasonable. The modest six percent does not leap from the page as does the 99.7 percent Texas fee for one office recounted in Bullock.

Obviously, as to the solvent candidate, the fee required, though by no means unreasonable or exorbitant, is in an amount sufficient to give pause to one who is not a serious candidate. No one seems very much concerned about the solvent individual one way or the other, and we will therefore pass on to a consideration of candidates of lesser means.

Wealth is not a prerequisite to a successful seeking of elective office in New Mexico. In fact, it might reasonably be said that New Mexico has something of a tradition that candidates of modest means can achieve success. The evidence makes this clear.

Mr. Mike Anaya, the State Chairman of the Democratic Party, testified that in his extensive experience at both the county and state levels, no serious candidate has been precluded from seeking office by the filing fee requirement. Mr. Fabian Chavez, who has sought a number of offices, usually successfully at least through the primary stage, testified to like effect. He stated that he had often announced his candidacy and commenced his campaign without funds with which to pay the statutory filing fee, but that raising the fee had never presented a problem. Neither Mr. Anaya nor Mr. Chavez knew of any serious candidate who has ever been precluded from seeking office by lack of funds with which to pay the filing fee.

Thus viewed in its true light vis-a-vis the candidate of modest means, the filing fee requirement is not designed, nor does it have the effect of, precluding his entree to the ballot, provided he is a serious candidate. In the case of

the impecunious candidate, the filing fee thus does not test his pocket book, but rather, the extent of his support. If he does not have the requisite support, he does not gain entree to the ballot and no harm is done because he had no occasion to be there. Yet, if he is a serious candidate, the filing fee is no impediment.

We find as a matter of fact that in New Mexico the serious candidate precluded from entree to the ballot by lack of funds does not exist.

In primary elections, by their nature, more candidates' names appear on the ballot than is the case in general elections. It is clear from the evidence, as well as from the court's personal experience, that this involves longer periods of time in the voting machines for the voter, and that in primaries, polling places become crowded and the waiting lines become long and restive.

In recognition of this, our statutes provide for a maximum of three and one-half minutes as the time period the voter may occupy the machine. Section 3-12-43, N.M.S.A., 1953. It is nevertheless, common knowledge, and the evidence clearly shows, that in primaries numerous voters, for whatever reason, do not or cannot wait their turn at the polling places and depart without having voted.

These problems would obviously be compounded by the ballot in its present form. A worksheet introduced in evidence which had been prepared for a Bernalillo County precinct, showed a total of 216 spaces would be occupied by candidates' names. The evidence clearly demonstrates and we find that to permit matters to stand as they are would result in a large, though unknown and unascertainable, number of voters being deprived of their elective franchise. Certainly, these would number at least in the hundreds and in all likelihood in the thousands.

Under the guidelines we have announced, more particularly Bullock, the State, in discharging its obligations, may exclude candidates who are not serious. Conversely, the exclusion of non-serious candidates does not deprive them of any federally recognized constitutional right because such exclusion is a discharge of the obligations of the State to provide its electorate with an uncluttered ballot. This leaves to us a resolution of the question as to who is and who is not a serious candidate. Obviously, this is not a matter susceptible to precise definition, but one must be a candidate with some substantial support for his candidacy among the electorate. Section 3-8-27, supra, however, furnishes a figure of fifteen percent of the vote as a prerequisite to refund of one-half of the filing fee. That statute, in conjunction with §3-8-26A, supra, requiring payment of the filing fee, working together, have proven an effective means of segregation between the serious and non-serious candidates.

There is certainly a valid interest in requiring some preliminary showing of a "significant modicum" of support before printing the name of a political organization and even more importantly the names of its candidates on the ballot. Jenness, et al. v. Fortson, Secretary of State of Georgia, 403 U.S. 431, 29 L.Ed.2d 554, 91 S.Ct. 1970.

It is suggested that we should refrain from all action, leaving corrective measures to the legislature. The inference seems to be that we are only concerned with one primary election—a matter of small consequence, and that somehow the electorate will muddle through.

Certainly alterations in the primary scheme may be appropriate and, if so, legislative action is clearly indicated. But we do not view our responsibilities so lightly. As matters stand, the electorate is in jeopardy of being

deprived of the benefits of the constitutional mandates that the elective franchise be free from abuse and to an uncluttered ballot.

It may be true that our immediate concern is with one primary election which will soon be history, but its effects will linger on, because emerging from the miserable shambles which exists will be nominees, depending upon the outcome of the general election, who will serve from January 1, 1973 for a period of eight years in the case of one Supreme Court and one Court of Appeals seat, and six years in the case of a United States Senator, a Corporation Commissioner and every district judge in the State. Other officers would be elected for lesser terms.

Before concluding our opinion, we must decide as to the standard by which to measure or evaluate the question of the constitutionality of our primary election filing fee requirements [§3-8-26A, supra] in the light of our legislative history in the area of political party nominations and our experiences and successes in the accomplishment of legislative objectives in this area under our filing fee system. Is the proper standard that of "rational relationship," or the more stringent one of "reasonable necessity," to the accomplishment of legitimate State objectives?

The question as to which of these standards was applicable to the Texas filing fee system was discussed and resolved in Bullock. Under the facts of that case, and "* * * [b]ecause the Texas filing fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, * * *" the United States Supreme Court determined that the Texas

laws establishing a filing fee system in that State "* * * must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster."

In making this determination, the court stated in part:

> "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.
>
> "Unlike a filing fee requirement which most candidates could be expected to fulfill from their own resources or at least through modest contributions, the very size of the fees imposed under the Texas system gives it a patently exclusionary character. * * * Not only are voters substantially limited in their choice of candidates, but there is the obvious likelihood of this limitation falling more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. * * * [W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status."

The court in Bullock also stated in considerable detail the legitimate interests and duties which a state has in the regulation of elections as shown by the quotation above from the opinion to this effect.

In the absence of any "evidence of any kind * * * in the record from which a legitimate state objective [could] be found," the three-judge federal court sitting in Dillon held that the statutory filing fee system in New Mexico, as applied to the three plaintiffs seeking to become candi-

dates for nomination to the office of United States Senator, was not "reasonably necessary to the accomplishment of legitimate state objectives."

The legislature of the State of New Mexico is charged with the duty of enacting laws which will secure the purity of elections and guard against the abuse of the elective franchise. Art. VII, §1, Constitution of New Mexico. As above related, our legislature has pursued, and the electorate of this State has tried, several ways of discharging this duty in regard to the process of nominating candidates for elective offices. New Mexico has legitimate interests in avoiding overcrowded ballots, in protecting the integrity of its political processes from frivolous and fraudulent candidacies, and in relieving, or at least in reducing, the costs to the State and county treasuries of conducting primary elections. Every barrier to candidacy access to the primary ballot, which is created in the accomplishment of these legitimate interests and with the purpose of protecting the right of franchise guaranteed to all qualified voters, is not subject to that degree of scrutiny which will meet the requirement of reasonable necessity. See Bullock v. Carter, supra. Unlike the court in the Bullock case, we know the number of candidates who have sought to enter the New Mexico primary, know the overcrowding of the ballot which will result if the names of all are permitted to be placed on the primary ballots as candidates, and know that a number of those who have filed declarations of candidacy will be fraudulent or frivolous candidates if given candidacy status on the primary ballot. It is apparent to us that the nominee for many positions will fall far short of having the support of a majority of the voters, or even a substantial plurality thereof. Instead of assuring equal protection of the franchise to New Mexico voters, the

potentially overcrowded ballot would result in the protection of clearly foreseeable inequalities in the exercise of this right of franchise.

The evidence in the record before us discloses and convinces us that no serious candidate has ever been barred from the primary ballot by our filing fee system. Unlike the Texas filing fee system which was declared constitutionally invalid in Bullock, our system, as shown by the evidence adduced, makes requirements as to filing fees which any serious candidate could be expected to fulfill from his own resources, or at least through modest contributions from his supporters.

We cannot say that our filing fee system, or any filing fee system, or for that matter any system yet devised to protect the purity of the elective ballot and the right of franchise, falls with absolutely equal weight upon the voters. The weight of the position of every voter, in relation to what must be done by him to successfully exercise his right of franchise, cannot be absolutely equal to the weight which the position of every other voter requires must be done to accomplish the exercise of this right. We can and do say with conviction that the record in this case clearly establishes that no measurable differences between burdens and no demonstrable differences between the chances of failure or success at the polls, are imposed upon serious candidates, and particularly upon their supporters by reason of their economic status, as a result of the filing fee requirements. We are convinced that in New Mexico at least, the economic status of a serious candidate has no substantially real relationship to the economic status of his supporters, and that matters such as political affiliation, geographic location of residence, uncommonness of name, and social, religious and other relationships and conditions present far greater ob-

stacles to political success than that of raising the required filing fee.

We are of the opinion that the posture of this case, as presently before us, requires only that we determine a rational relationship exists between our filing fee requirements and the legislative duty to protect the purity of elections and guard against abuses of the elective franchise in order to meet the requirements of the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States and of Art. II, §18 of the Constitution of New Mexico. Clearly a rational basis for our filing fee system is demonstrated by the record in this case.

However, even if the proper standard should be that applied by the court in Bullock, we would still reach the same result, because there is no doubt in our minds that the application to the forthcoming primary election of the filing fee requirements of §3-8-26A, supra, is reasonably necessary to protect the purity of the nominating process to be accomplished in that election, to protect against the appearance on the ballots of the names of frivolous and fraudulent candidates, to assure that the nominees elected have the support of at least a substantial plurality of the voters, and to assure the voters equal protection of the law in relation to the exercise of their voting franchise.

Even if we were of the opinion that §3-8-26A, supra, fails to meet the constitutional requirement of equal protection, we would not, because of the time element, apply our ruling to the forthcoming primary election, but would follow the course taken by the court in Jenness v. Little, 306 F.Supp. 925 (D.C.N.D. Ga. 1969). We would make our decision apply prospectively only to primary elections

to be held subsequent to the June 6, 1972 primary election, and we would do so to avoid what we believe will be certain chaos, confusion, frustration and disenfranchisement of a great number of our voters, if the ballots carry the names of all who have filed declarations of candidacy. Our voting machinery is not geared to handle ballots of this length during the allotted time of 8:00 a.m. to 7:00 p.m. on the same day, as provided by §3-12-1, N.M.S.A. 1953 (Repl. Vol. 1, 1970).

Finally, a word concerning Dillon. We are not bound by that decision, if we understand it correctly. United States ex rel. Florence v. Woods, 432 F.2d 1072 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971). We have, however, given weight to the specific holding in Dillon by excepting Messrs. Dillon, Cole and Gallard from the purview and operation of our decision. This we are pleased to do, not only under an extension of the doctrine of comity between courts, but by reason of our warm regard and respect for our learned brethren of the three-judge panel.

It has been argued to us that the true effect of Dillon was to exempt the Senate race from the operation of §3-8-26A, supra. From a careful reading of the Memorandum Opinion, we do not see how this could be so, although admittedly, there is language in the Memorandum Opinion to this effect. From an examination of the pleadings and the scope of the issues thereby presented, as well as the rationale of the Memorandum Opinion, it is clear that the three-judge panel reached its result predicated upon the fact that the named individuals were unable to pay the filing fee. As carefully pointed out in the Memorandum Opinion, there was no evidence adduced and it would thus have been logically impossible for the court to have determined that all others who might seek to be-

come candidates were without funds with which to pay the required filing fees. In fact, their identities could not even then have been known.

We, on the other hand, have the advantage not only of having this information available, but also of having heard and considered lengthy testimony and other relevant evidence.

While we have readily conceded the supremacy of the United States Supreme Court on federal constitutional questions and recognize the fact that careful consideration ought to be given to decisions of inferior federal courts, we are at the same time mindful of the fact that our decisions are supreme on state constitutional questions and the objectives, purposes, true legislative intent and meaning of state statutes.

We should and do hereby affirm the validity of our decisions and commands stated in the "Order Making Alternative Writ of Mandamus Absolute" which was issued on April 17, 1972.

IT IS SO ORDERED.

s/ John B. McManus, Jr., J.
s/ LaFel E. Oman, J.
s/ Donnan Stephenson, J.

In the Supreme Court of the United States

..... TERM, 197.....

No. A-1096

TERRY BROWN, ARLENE CIRELLI, PATRICK O'HEARN, and BOB YOUNG,
Petitioners,

vs.

NEW MEXICO *ex rel.* A. L. HAPPY APODACA, A. L. HAPPY APODACA, DAVID L. NORVELL, Attorney General of the State of New Mexico, and BETTY FIORINA, Secretary of the State of New Mexico,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION

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TERRY BROWN, ARLENE CIRELLI, PATRICK O'HEARN, and BOB YOUNG,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion below is adequately discussed in Respondent's Brief in Opposition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(1) Has the repeal of Sect. 3-8-26, N.M.S.A. 1953, and the subsequent enactment of a new Sect. 3-8-26, N.M.S.A. 1953, by the New Mexico Legislature rendered this case moot.

STATUTORY PROVISIONS INVOLVED

(1) Sect. 3-8-26, N.M.S.A. 1953 (Repealed by Laws 1973, Chapter 228, Section 11), Primary Election Law—Filing Fees.

(2) Sect. 3-8-26, N.M.S.A. 1953 (Laws 1973, Chapter 228, Section 11), Primary Election Law—Filing Fees.

(3) Sect. 3-8-26.1, N.M.S.A. 1953 (Laws 1973, Chapter 228, Section 12), Primary Election Law—Pauper's Statement in Lieu of Filing Fee.

A copy of each is set out in full in Appendix A.

STATEMENT OF THE CASE

The statement of the case is adequately discussed in the Petition and in the Brief for Respondents in opposition.

ARGUMENT

I

Has the Repeal of Section 3-8-26, N.M.S.A. 1953, and the Subsequent Enactment of a New Section 3-8-26, N.M.S.A. 1953, by the New Mexico Legislature Rendered This Case Moot.

Petitioners herein sought to intervene in an original mandamus proceeding brought in the New Mexico Supreme Court to compel the Secretary of State of New Mexico to certify only the names of persons who paid the filing fees prescribed by Sect. 3-8-26(A), N.M.S.A. 1953 (Repl. Vol. 1, 1970) as candidates in the primary election scheduled to be held June 6, 1972, or alternatively, to certify only those who would tender such fees within such time and under such conditions as the New Mexico Supreme Court should prescribe (Brief for Resp. in Opp. App. B). Petitioner's motion for intervention was denied and they sought their relief in this Court. Since the filing of their Petition for Writ of Certiorari the New Mexico Legislature has repealed the statutes in question and enacted new statutes in their place. It is respondent's position that this subsequent action by the New Mexico Legislature has rendered moot petitioner's claims.

It has been said that the duties of this Court:

> * * * is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. *Mills* v. *Green*, 159 U.S. 651, 653, 40 L.Ed. 293, 294, 16 S.Ct. 132. See also *Local No. 8-6 Oil, Chemical & Atomic*

Workers International Union, AFL-CIO, et al. v. *Missouri*, 361 U.S. 363, 80 S.Ct. 391, 4 L.Ed.2d 373.

Just when review by this Court is appropriate and when it is inappropriate is not particularly clear and has been the subject of continual litigation. Such litigation has raised many questions and, on occasion, criticisms, Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672 (1970), however, it is suggested that if petitioner's original contentions are considered in connection with the recent change of Sect. 3-8-26, supra, it is obvious that the case is moot by any standard.

A cause of action can be rendered moot in any one of several different ways. In the instant case we are faced with a subsequent change of law which, it is contended, negates further prosecution of the matter in this Court.

When the intervening and possibly mooting event is a change of law subsequent to the filing of the case, but prior to determination, it is necessary that the Court undertake an inquiry to ascertain the consequences of such change of law. Such inquiry must entail an examination of the points of contention and the newly enacted law to determine whether the issues presented by the original litigation are still present. In other words, is the principle contended by the challenging party satisfied by the new law?

Speaking somewhat in generalities it can be said that petitioners were seeking a forum in which to challenge New Mexico's filing fee requirement. Under this statute, before a person's name could be placed on the primary election ballot it was necessary that certain filing fees be paid to the Secretary of State.

Both petitioners herein and appellant Norvell in the companion case to this, *Norvell* v. *New Mexico ex rel. Apodaca*, No. A-1097, argue that the previous system set forth in Sect. 3-8-26, N.M.S.A. 1953 (Repealed by Laws 1973, Chapter 228, Section 11), was in contravention of the equal protection doctrines governing filing fees as announced in *Bullock* v. *Carter*, 40 U.S.L.W. 4211 (U.S. Sup. Ct. February 24, 1972).

In the argument challenging the constitutionality of the New Mexico filing fee statute, an argument utilized in both *Brown* v. *New Mexico ex rel. Apodaca*, No. A-1096 and *Norvell* v. *New Mexico ex rel. Apodaca*, No. A-1097, it is first argued that the standard applied by the New Mexico Supreme Court, that of "the legislative duty to protect the purity of elections and guard against abuses of the elective franchise" was improper. In support of such contention the following was quoted from *Bullock* v. *Carter*, supra:

> because the Texas filing fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude . . . that the laws must be "closely scrutinized" and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster. 40 U.S.L.W. at 4214.

Secondly, it was argued that the reason given by the New Mexico Supreme Court as justification for such filing fee, that of keeping non-serious candidates off the ballot, was insufficient. In support of this contention *Bullock* v. *Carter*, supra, was again relied upon. Both appellant and petitioner, in their respective briefs, admitted that this Court in *Bullock* condoned such as legitimate concern and perhaps a legislative duty, but they tempered such concession by the following language from that case:

> to say that the filing fee requirement tends to limit the ballot to the more serious candidates is not enough. There may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy, but the candidates in this case affirmatively alleged that they were unable not simply unwilling, to pay the assessed fees and there was no contrary evidence . . . And even assuming that every person paying the large fees required by Texas takes his own candidacy seriously, that does not make him a "serious candidate" in the popular sense. If the Texas fee rquirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal; other means to protect those valid interests are available. 40 U.S.L.W. at 4215 (footnotes omitted).

Considering such arguments in light of the newly enacted legislation replacing the repealed filing fee requirement, it can be only concluded that any such claims or contentions have been alleviated. Under the new law which requires only the filing of fifty dollars ($50.00) in declaring candidacy of any office, and further provides for a pauper's statement in lieu of the fifty dollar filing fee, it can no longer be argued that filing fees restrict the exercise of the franchise through a classification based upon wealth. Even this Court recognized in *Bullock* v. *Carter*, supra, that a "reasonable" candidate fee is acceptable and it certainly can be argued that the sum now prescribed by statute is reasonable. Further, it can be argued that this fifty dollars ($50.00) constitutes a source of funds to cover the cost of filing and is, therefore, "reasonably necessary to the accomplishment of legitimate state objectives . . ." 40 U.S.L.W. at 4214.

Respondent's request is not without precedent. This Court on many occasions has rendered moot pending mat-

ters where there was an intervening change of law. In *Hall* v. *Beals*, 396 U.S. 45 (1969), appellants, who had moved to Colorado from California, sought to vote in the 1968 Presidential Elections but were denied such privilege based on the Colorado residency requirement of six (6) months. Appellants instituted a class action to enjoin enforcement and operations of the Colorado statute, but that action was dismissed by the Three-judge District Court. Direct appeal to this Court was taken. In a per curiam opinion this Court observed:

> The 1963 election is history, and it is now impossible to grant the appellants the relief they sought in the District Court. Further, the appellants have now satisfied the six-month residency requirement of which they complained. But apart from these considerations, the recent amendatory action of the Colorado Legislature has surely operated to render this case moot. We review the judgment below in light of the Colorado statute as it now stands, not as it once did. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-282, 89 S.Ct. 518, 526, 21 L.Ed.2d 474; *United States* v. *Alabama*, 362 U.S. 602, 604, 80 S.Ct. 924, 926, 4 L.Ed.2d 982; *Hines* v. *Davidowitz*, 312 U.S. 52, 60, 61 S.Ct. 399, 400, 85 L.Ed. 581; *Carpenter* v. *Wabash R. Co.*, 309 U.S. 23, 26-27, 60 S.Ct. 416, 417-418, 84 L.Ed. 558; *United States* v. *Schooner Peggy*, 1 Cranch 103, 110, 2 L.Ed. 49. And under the statute as currently written, the appellants could have voted in the 1968 presidential election. The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law. *Golden* v. *Zwickler*, 394 U.S. 103, 110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113; *Baker* v. *Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663; *Mills* v. *Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293.

The Court emphasized that:

> So far as they are concerned nothing in the Colorado legislative scheme as (thus) written adversely (affected) either their present interests, or their interests at the time this litigation was commenced.

In rendering this decision this Court recognized that appellants therein could have foreseeably taken up residence in some other state and face disqualification under that state's law, or, for that matter, that they could return and re-establish their residence in Colorado within the two month requirement. Nonetheless, the majority refused to yield to "such speculative contingencies".

In *Watts* v. *Seward School Board*, 381 U.S. 41 (1965), two teachers who were dismissed on grounds of "immorality", as defined by state statute, petitioned for writ of certiorari to this Court. Subsequent to the filing of the case the Alaska legislature amended its statutes in this area. In light of this intervening action this Court dismissed the Alaska Supreme Court decision affirming the dismissal of the teachers and remanded it for considerations under the amended statutes. The Court observed:

> This Court has held that supervening changes in state law that may be relevant to the disposition of a case may require that the cause be remanded for appropriate action by state court.

There have, of course, been cases where such supervening events have been held not to render moot a case pending in this Court. For instance, in *Brockington* v. *Rhodes*, 396 U.S. 45 (1969), in which Ohio's election requirement of a petition signed by 7% of the qualified voters of district was challenged, this Court refused to dismiss the cause based on mootness in spite of the intervening action by that state's legislature changing the petition

requirement from 7% to 4%. The Court held that the legislative enactment did not render the case moot since petitioners had consistently argued that the requirement in excess of 1% was unconstitutional. However, the Court did hold the matter was moot since the congressional election was over and since "appellant did not allege that he intended to run for office in any future elections." Further, the action was not a class action giving rise to possibility of other future candidates.

A similar result evolved from *Moore* v. *Ogilive*, 394 U.S. 814 (1969), also involving signature requirement on petitions. In that case the Court reasoned that the burden remained for future elections and was therefore not moot.

As has already been discussed, the New Mexico filing fee requirement "as currently written" no longer "adversely affects either their present interests, or their interests at the time this litigation was commenced." Nor is this case susceptible to the same criticism the *Hall* v. *Beals* decision has been subjected to, 83 Harv. L. Rev. 1672, that of being "capable of repetition, yet evading review." Further, in the case at bar none of the parties have any filing fees which are being held pending the outcome of this matter.

Before concluding, mention must be made of a provision in the New Mexico Constitution. Article IV, Sect. 33 of the New Mexico Constitution provides that, "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." In *Fidelity & Deposit Company of Maryland* v. *Tafoya*, 270 U.S. 426 (1926), a case involving the license of a foreign corporation to do business in New Mexico, this Court declined to dismiss the matter in spite of the intervening repeal of the statute in question. The Court observed that because of the above quoted pro-

vision in the New Mexico Constitution it was "at least possible that the state courts might hold that the plaintiff was still liable to lose its license . . .". In the case at bar no such problem exists. The election is over, the parties have no monies being held by the state, and their only purpose was to attack the filing fee requirement. As a consequence, they have no interests which can be jeopardized by the operation of this provision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this cause be dismissed.

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APPENDIX

3-8-26. Primary Election Law—Filing fees—The filing fee for each of the following offices is:

A. All officers receiving salary .....
..... 6% of the first year's salary

B. Lieutenant governor $400.00

C. Member of the legislature 50.00

D. Member of the state board of education 50.00

E. County surveyor 20.00

STATE OF NEW MEXICO
office of
THE SECRETARY OF STATE

Certificate

I, Betty Fiorina, Secretary of State of the State of New Mexico, do hereby certify that the attached is a true and correct copy of the Enrolled and Engrossed HOUSE FLOOR SUBSTITUTE FOR HOUSE PRIVILEGES AND ELECTIONS COMMITTEE SUBSTITUTE FOR HOUSE BILL NUMBER 338, AS AMENDED and signed by the Honorable Bruce King, Governor on March 29, 1973 now being Laws 1973, Chapter 228.

Given under my hand and the Great Seal of the State of New Mexico, in the City of Santa Fe, the Capital on this 2nd day of April, A.D. 1973.

/s/ Betty Fiorina
Secretary of State

(Great Seal of the
State of New Mexico 1912)

The Legislature
of the
STATE OF NEW MEXICO
31st Legislature, 1st Session
LAWS 1973
CHAPTER 228

HOUSE FLOOR SUBSTITUTE FOR HOUSE PRIVILEGES AND ELECTIONS COMMITTEE SUBSTITUTE FOR HOUSE BILL No. 383, AS AMENDED, EMERGENCY CLAUSE

Introduced by

(Great Seal of the
State of New Mexico 1912)

CHAPTER 228

AN ACT

RELATING TO THE ELECTION CODE; PROVIDING FOR CANDIDACY IN PRIMARY ELECTIONS; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 3-8-17 NMSA 1953 (being Laws 1969, Chapter 240, Section 167) is amended to read:

"3-8-17. PRIMARY ELECTION LAW—WHO MAY BECOME A CANDIDATE.—

A. No person who has changed his party affiliation subsequent to the governor's proclamation for the pri-

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HFS/HPECS/HB 383
Approved March 29, 1973

mary election shall become a candidate for nomination for any office at such primary election.

B. No person shall become a candidate for nomination by a political party unless his record of registration shows his affiliation with that political party on the date which he files his declaration of candidacy for the primary election."

Section 2. Section 3-8-19 NMSA 1953 (being Laws 1969, Chapter 240, Section 169) is repealed and a new Section 3-8-19 NMSA 1953 is enacted to read:

"3-8-19. PRIMARY ELECTION LAW—METHOD OF PLACING NAMES ON PRIMARY BALLOT.—

A. All candidates for nominations to be made at any primary election for the office of United States representative, for any office voted upon by all the voters of the state, for a member of the legislature, district judge, district attorney, state board of education or magistrate shall have their names placed on the primary election ballot by filing a declaration of candidacy and a nominating petition as prescribed by the Primary Election Law.

B. All other candidates for nominations to be made at any primary election shall have their names placed on the primary election ballot by filing a declaration of candidacy and paying the filing fee prescribed by law or by filing a declaration of candidacy and filing a pauper's statement of inability to pay the prescribed filing fee."

Section 3. Section 3-8-24 NMSA 1953 (being Laws 1969, Chapter 240, Section 174) is repealed and a new Section 3-8-24 NMSA 1953 is enacted to read:

"3-8-24. PRIMARY ELECTION LAW—DECLARATION OF CANDIDACY—SWORN STATEMENT OF INTENT—FORM.—In making a declaration of candidacy the

candidate shall submit a sworn statement of intent in substantially the following form:

"DECLARATION OF CANDIDACY—STATEMENT OF INTENT

I, ..., (candidate's name on affidavit of registration) being first duly sworn, say that I am a qualified elector of precinct No. ..... of the county of ....., State of New Mexico;

I am a member of the ..... party as shown by my affidavit of registration and I have not changed such party affiliation subsequent to the Governor's proclamation calling the primary in which I seek to be a candidate;

I desire to become a candidate for the office of ..... at the primary election to be held on the date set by law for this year, and if the office be that of a member of the legislature, that I actually reside within the legislative district for which I declare my candidacy;

I will be eligible and legally qualified to hold this office at the beginning of its term;

If a candidate for any office for which a nominating petition is required, I am submitting with this statement a nominating petition in the form and manner as prescribed by the Primary Election Law; and

I make the foregoing affidavit under oath, knowing that any false statement herein constitutes a felony punishable under the criminal laws of New Mexico.

.....
(Declarant)

.....
(Mailing Address)

Subscribed and sworn to before me this .....

day of ....., 19.....

.....

(Notary Public)

My commission expires:

....."."

Section 4. A new Section 3-8-24.1 NMSA 1953 is enacted to read:

"3-8-24.1. PRIMARY ELECTION LAW—DECLARATION OF CANDIDACY--NOMINATING PETITION—FILING AND FORM.—

A. As used in the Primary Election Law, "nominatting petition" means the form or forms used for obtaining the required number of signatures of registered voters which is signed on behalf of the person wishing to become a candidate for a political office in the primary election requiring a nominating petition.

B. In making a declaration of candidacy, the candidate at the same time shall file a nominating petition which shall be on forms prescribed by law.

C. The nominating petition shall be on paper eight and one-half inches wide and fourteen inches long with twenty-five lines spaced three-eighth of an inch apart and numbered from one to twenty-five and in the following form:

"NOMINATING PETITION

I, the undersigned, a registered voter of the county of ....., New Mexico, and a member of the ..... party, hereby nominate ....., who resides at ..... in the county of

....., New Mexico, for the party nomination for the office of ....., to be voted for at the primary election to be held on the first Tuesday of June this year, and I declare that I have not signed, and will not sign, any nominating petition for more persons than the number of candidates necessary to fill such office at the next ensuing general election.

1. .....
(signature) (name printed) (Pct. No.)
(address, city)

2. .....
(signature) (name printed) (Pct. No.)
(address, city)

3. etc. . . .".

D. When more than one sheet is required for a petition, each of the sheets shall be in the form prescribed by this section and all sheets shall be firmly secured in the upper left-hand corner by a staple or other suitable fastening."

Section 5. A new Section 3-8-24.2 NMSA 1953 is enacted to read:

"3-8-24.2. PRIMARY ELECTION LAW—DECLARATION OF CANDIDACY—NOMINATING PETITION—SIGNING AND CERTIFICATION.—

A. Each signer of a nominating petition shall sign but one petition for the same office unless more than one candidate is to be elected to such office, and in that case not more than the number of nominating petitions equal to the number of candidates to be elected to the office shall be signed.

B. A signature shall be counted on a nominating petition unless:

(1) the signature is not upon the form prescribed by the Primary Election Law;

(2) there is evidence presented that the person signing is not a registered voter of the state, district, county or area to be represented by the office for which the person being nominated is a candidate;

(3) there is evidence presented that the person signing has signed more than one petition for the same office or has signed one petition more than once except as provided in Subsection A of this section;

(4) there is evidence presented that the person signing is not of the same political party as the candidate named in the nominating petition as shown by the signer's affidavit of registration; or

(5) there is evidence presented that the person signing is not the person whose name appears on the nominating petition."

Section 6. A new Section 3-8-24.3 NMSA 1953 is enacted to read:

"3-8-24.3. PRIMARY ELECTION LAW—NOMINATING PETITION—FALSIFYING.—Any person who knowingly falsifies any information on a nominating petition is guilty of falsifying an election document."

Section 7. A new Section 3-8-24.4 NMSA 1953 is enacted to read:

"3-8-24.4. PRIMARY ELECTION LAW—NOMINATING PETITION—NUMBER OF SIGNATURES REQUIRED.—

A. The basis of percentage for the votes of the party in each instance referred to in this section shall be the total vote for the party's candidates for governor at the

last preceding primary election at which the party's candidate for governor was nominated.

B. Nominating petitions for a candidate for United States senator or any state-wide elective office shall be signed by a number of voters equal to at least one percent of the votes of the party of the candidate in each of at least ten counties in the state and not less than three percent of the total vote of his party in the state.

C. Nominating petitions for a candidate for United States representative shall be signed by a number of voters equal to at least one percent of the votes of the party of the candidate in each of at least five counties of the congressional district, and not less than three percent of the total vote of his party in the congressional district.

D. Nominating petitions for a candidate for member of the legislature, district judge, district attorney, state board of education or magistrate shall be signed by a number of voters equal to at least three percent of the total vote of his party in the district or division as the case may be."

Section 8. A new Section 3-8-24.5 NMSA 1953 is enacted to read:

"3-8-24.5. PRIMARY ELECTION LAW—NOMINATING PETITION—WITHDRAWALS AND ADDITIONS.—A nominating petition when filed shall not be withdrawn nor added to, nor shall any person be permitted to revoke his signature thereon."

Section 9. A new Section 3-8-24.6 NMSA 1953 is enacted to read:

"3-8-24.6. PRIMARY ELECTION LAW—NOMINATING PETITION—LIMITATION ON APPEALS OF VALIDITY OF NOMINATING PETITIONS.—

A. Any voter filing any court action challenging a nominating petition provided for in the Primary Election Law shall do so within ten days after the last day for filing declaration of candidacy. Within ten days after the filing of the action, the district court shall hear and render a decision on the matter. Such decision shall be appealable only to the supreme court and notice of appeal shall be filed within five days after the decision of the district court. The supreme court shall hear and render a decision on the appeal forthwith.

B. For the purposes of an action challenging a nominating petition, each person filing a nominating petition under the Primary Election Law appoints the proper filing officer as his agent to receive service of process. Immediately upon receipt of process served upon the proper filing officer, such officer shall, by certified mail, return receipt requested, mail the process to the person."

Section 10. A new Section 3-8-24.7 NMSA 1953 is enacted to read:

"3-8-24.7. PRIMARY ELECTION LAW—WRITE-IN CANDIDATES.—

A. A write-in vote in the primary election for the office of United States representative in congress, an office voted upon by all the voters of the state, for a member of the legislature, district judge, district attorney, state board of education or magistrate shall be counted and canvassed as if the name written in was printed on the ballot, provided:

(1) the person whose name has been written in has filed a declaration of intent to be a write-in candidate pursuant to this section;

(2) the person is qualified to be a candidate in the primary election for the political party for which he is a write-in candidate; and

(3) the name of the write-in candidate is written in the slot provided on the voting machine or on the blank line provided on the paper ballot for the designated office.

B. A person desiring to be a write-in candidate on the primary election ballot of the political party of his registration shall file with the proper filing officer a declaration of intent to be a write-in candidate. Such declaration of intent shall be filed before 5:00 p.m. on the twenty-second day preceding the primary election at which such candidacy is to be considered.

C. The secretary of state shall prescribe the form of the declaration of intent to be a write-in candidate.

D. As used in this section, "write-in" does not include the imprinting of any name by rubber stamp or similar device, or the use of preprinted stickers or labels."

Section 11. Section 3-8-26 NMSA 1953 (being Laws 1969, Chapter 240, Section 176) is repealed and a new Section 3-8-26 NMSA 1953 is enacted to read:

"3-8-26. PRIMARY ELECTION LAW—FILING FEE.—The filing fee for any office for which a filing fee is required to be paid at the time of filing a declaration of candidacy shall be fifty dollars ($50.00)."

Section 12. A new Section 3-8-26.1 NMSA 1953 is enacted to read:

"3-8-26.1. PRIMARY ELECTION LAW—PAUPER'S STATEMENT IN LIEU OF FILING FEE.—In the event any candidate is unable to pay the filing fee prescribed by the Primary Election Law he may file a statement with the proper filing officer at the time he files his declaration

of candidacy to the effect that he is without financial means to pay such filing fee. The statement shall be sworn and subscribed to on the form prescribed by the secretary of state and furnished to each county clerk and shall be attached by the proper filing officer to the declaration of candidacy."

Section 13. EMERGENCY.—It is necessary for the public peace, health and safety that this act take effect immediately.

/s/ Walter K. Martinez, Speaker
House of Representatives

/s/ Albert Romero, Chief Clerk
House of Representatives

/s/ Robert A. Mondragon, President
Senate

/s/ Juanita Pino, Chief Clerk
Senate

Approved by me this 29th day of March, 1973.

/s/ Bruce King, Governor
State of New Mexico

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 71-1512

TERRY BROWN, ARLENE CIRELLI, PATRICK O'HEARN, and BOB YOUNG,

Petitioners,

—v.—

NEW MEXICO *ex rel.* A. L. HAPPY APODACA, A. L. HAPPY APODACA, DAVID L. NORVELL, Attorney General of the State of New Mexico, and BETTY FIORINA, Secretary of State of the State of New Mexico,

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONERS

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Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONERS

In May 1972, the petitioners filed a petition for certiorari in this case, seeking review of a decision of the Supreme Court of New Mexico. That decision had denied to the petitioners, who were potential voters and candidates for nomination in primary elections, leave to intervene in a mandamus proceeding which upheld the constitutionality of the state statute requiring filing fees for primary candidates. The validity of the New Mexico decision upholding that statute is also at issue in *Norvell* v. *New Mexico ex rel. Apodaca,* No. 71-1511, in which the Jurisdictional Statement was filed by the undersigned counsel simultaneously with the petition in the instant case. To date, no action has been taken in either case, and both cases remain on the Court's docket.

The respondents have now filed a Supplemental Brief contending that by virtue of intervening circumstances the issues have been rendered moot. The basis for this contention is that New Mexico has enacted new legislation dealing with the question of filing fees in primary elections. Under the former statute challenged in this case and in No. 71-1511, New Mexico assessed a filing fee, for all but four offices, equal to six percent of the annual salary of the office sought, for all candidates for party nomination in primary elections. Section 3-8-26A, N.M.S.A., 1953 (Repl. Vol. 1, 1970). The new legislation repealed this provision and replaced it with a fee of $50 for any office for which a filing fee is required. Any candidate unable to pay this fee may file a sworn statement that he or she is without financial means to do so.

Without in any way conceding that the issues in this case have been rendered moot by the statutory changes, the petitioners would suggest that the appropriate disposition of this case and of No. 71-1511 would be to vacate the judgment of the New Mexico Supreme Court and remand the case to that court for consideration of the mootness question in light of the new developments. That was the precise disposition made in *Johnson* v. *New York State Education Department*, 409 U.S. 75 (1972), a case involving access by indigent students to free textbooks where there had been an intervening decision by the school district to provide such books. See also, *Struck* v. *Secretary of Defense*, —— U.S. ——, 41 U.S. Law Week 3346 (No. 72-178, Dec. 18, 1972).

CONCLUSION

For the foregoing reasons, the judgment of the New Mexico Supreme Court should be vacated and the case remanded with instructions to consider whether enactment of Section 3-8-26, N.M.S.A. 1953, has rendered this case moot.

Respectfully submitted,

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July, 1973

SEP 21

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Earlier this year, the respondents in this case filed a supplemental brief contending that by virtue of intervening circumstances, namely the enactment of new legislation, the case had been rendered moot. Without conceding that the issues had been rendered moot by the statutory changes, the petitioners filed a supplemental brief in July, 1973, suggesting that the judgment below be vacated and the matter be remanded for consideration of the mootness issue. For the following reasons, we now modify that suggestion and urge instead that this court grant certiorari in this case, note jurisdiction in the companion case (No. 71-1511) and resolve the issues on the merits.

When our earlier Supplemental Brief was filed, counsel's attention was primarily focused on the effect of the statutory changes on the claims of the petitioners—candidates

and their supporters, who were unable to pay the filing fees previously required, and who had been denied the right to participate in the New Mexico Supreme Court mandamus proceedings below.

In the course of the petitioners' Supplemental Brief, it was also suggested that a remand would be appropriate in the companion case, *Norvell* v. *New Mexico ex rel. Apodada*, No. 71-1511. However, because of certain facts, some of which have only recently come to counsel's attention, this suggestion was in error.

No. 71-1511 is the appeal from the New Mexico Supreme Court ruling which upheld the constitutionality of the then existing statutory filing fee. The judgment of the New Mexico Supreme Court purports to bind all persons seeking electoral office through the primary system, and is not limited to those persons who were parties to the mandamus action. Indeed, although the only parties to the mandamus action were Apodada, as petitioner, and Norvell and Fiorina, as respondents, the Supreme Court of New Mexico undertook to adjudicate the constitutionality of the filing fee system as applied to every potential candidate. Even those candidates who sought to intervene, after the extremely short notice afforded by the Court, were precluded from participating in the litigation, although their right to run for political office was directly affected by any decision rendered by the state tribunal.[1]

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[1] The Supreme Court of New Mexico waived its own rules requiring ten days' notice to answer in a mandamus action and further ruled that the candidates themselves were not indispensable parties or, in the language of the rule, persons "directly affected" by the litigation, although the ultimate decision would perforce determine their right to run for political office. See 21-2-1 (24) (1) and (3), N.M.S.A., 1953 Comp.

As a consequence of the New Mexico Supreme Court decision, during the primary election various of the candidates paid the filing fee under protest. These monies have been segregated by the Secretary of State, pending this Court's decision in these cases. At least one of those candidates, Peter Gallagher, a candidate for the Democratic nomination to the State Supreme Court, brought suit in federal court seeking to recover the monies so paid. *Brown, et al. v. Fiorina,* United States district court for the district of New Mexico (No. 9418). Although an amended complaint was very recently dismissed on procedural grounds, without prejudice, a new action will be filed.

Accordingly, the existence of candidates for primary nomination, who have paid the filing fee under protest, but who are bound by the terms of the mandamus judgment that the filing fee statutes are constitutional, clearly presents an immediate and bona fide controversy over the validity of the repealed filing fee statutory scheme. If the filing fee system existent in New Mexico at the time the judgment of the Supreme Court of New Mexico was rendered is unconstitutional, then it is invalid as to all candidates for office and not just those who were financially unable to pay the fees. Indeed, as is shown by its opinion, the Supreme Court was presented with the possibility that the filing fee statutes should be construed to apply only to persons financially able to pay the filing fee and not to indigent persons, thus saving its constitutionality under the Fourteenth Amendment. The Supreme Court of New Mexico clearly rejected this construction of the filing fee requirements and held that they applied to persons both able and unable to pay the fee. Since the highest court of the state has construed the statute in question to apply to all candidates irrespec-

tive of their financial status, the statute must be sustained or must fall accordingly. If the statute is unconstitutional under the Fourteenth Amendment by reason of its impact on the impecunious candidate, then it is invalid as to every candidate irrespective of his personal wealth or ability to meet the fee. See, *e.g.*, *Sugarman* v. *Dougall*, —— U.S. ——, 41 U.S. Law Week 5138 (June 25, 1973).

Under traditional principles of constitutional adjudication, a case is not rendered moot so long as the decision appealed from "continues to play a substantial role in the response of officials" to the actions of the persons bound by it. See *Carroll* v. *President and Commissioners*, 393 U.S. 175, 178-179 (1968). Similarly, where the decision of the lower court may "be the basis of further proceedings", the controversy is not mooted. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). In the case at bar, the decision of the Secretary of State to return to the candidates the monies paid under protest will admittedly be governed by the decision of the United States Supreme Court in the case at bar. That is precisely why she has kept these monies in a suspense account pending the outcome of this litigation. Further, the decision of the New Mexico Supreme Court is the subject of further action in the United States District Court for the District of New Mexico to secure the return of the monies paid under protest by at least one candidate.

Finally, the case at bar presents a unique opportunity for the United States Supreme Court to determine the validity of a filing fee statute in light of an election held, in part, with no filing fee. The primary elections in New Mexico in 1972 were held pursuant to the filing fee statute except for the office of United States Senate. The United

States District Court for the District of New Mexico had held in a prior decision that the filing fee statutes were unconstitutional with respect to that office and ordered that no filing fees be collected for any candidates seeking that office.[2] Accordingly, this Court would have an opportunity to review the various contentions in support of filing fees—i.e., that filing fee requirements insure strong pluralities, etc.—in light of the actual election returns for the one office for which no filing fee was required, and determine their validity by reference to empirical evidence otherwise unavailable to it.

For this reason, the existence of candidates paying the fee under protest and of a segregated fund holding such monies clearly maintains a justiciable controversy which is not and can not be rendered moot by subsequent repeal of the unconstitutional statute. Various candidates have a direct financial interest in these funds, the return of which is dependent on the validity or invalidity of the Supreme Court of New Mexico's judgment. Accordingly, contrary to our prior suggestion, this case should not be vacated and remanded due to the repeal of the statute in question, and this Court should decide on the merits the issues presented herein, and in No. 71-1511.

[2] The only plaintiffs to the prior federal suit were candidates for the United States Senate and the decision of the court invalidating the fees was accordingly limited.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted in this case, and jurisdiction should be noted in No. 71-1511.

Respectfully submitted,

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September, 1973